TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted] 199

AUSTIN NICHOLS & COMPANY, PETITIONER,

vs.

STEAMSHIP ISLA DE PANAY, HER ENGINES, ETC., COMPANIA TRASATLANTICA

No. [redacted] 200

EUG. SANCHEZ AND JOSE GILDE SAGREDO, COPARTNERS, TRADING AS E. SANCHEZ & COMPANY, PETITIONERS,

vs.

STEAMSHIP ISLA DE PANAY, HER ENGINES, ETC., COMPANIA TRASATLANTICA

No. [redacted] 201

E. TOLIBIA & COMPANY, PETITIONER,

vs.

STEAMSHIP ISLA DE PANAY, HER ENGINES, ETC., COMPANIA TRASATLANTICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR WRITS FILED OCTOBER 11, 1924

CERTIORARI GRANTED NOVEMBER 12, 1924

(29,019, 29,020, 29,021)

(29,919, 29,920, 29,921)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 609

AUSTIN NICHOLS & COMPANY, PETITIONER,

vs.

STEAMSHIP ISLA DE PANAY, HER ENGINES, ETC., COMPANIA TRASATLANTICA

No. 610

EUG. SANCHEZ AND JOSE GILDE SAGREDO, COPARTNERS, TRADING AS E. SANCHEZ & COMPANY, PETITIONERS,

vs.

STEAMSHIP ISLA DE PANAY, HER ENGINES, ETC., COMPANIA TRASATLANTICA

No. 611

E. TOLIBIA & COMPANY, PETITIONER,

vs.

STEAMSHIP ISLA DE PANAY, HER ENGINES, ETC., COMPANIA TRASATLANTICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1] **UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

Docket No. 64—312

AUSTIN NICHOLS & COMPANY, Libellant,

against

Steamship "ISLA DE PANAY," Her Engines, etc., Claimant

Docket No. 64—306

EUG. SANCHEZ and JOSE GILDE SAGREDO, Copartners, Trading as E. Sanchez & Company, Libellants,

against

Steamship "ISLA DE PANAY," Her Engines, etc., Claimant

Docket No. 84—389

E. TOLIBIA & COMPANY, Libellant,

against

Steamship "ISLA DE PANAY," Her Engines, etc., Claimant

STATEMENT

1917.
Dec. 20. Filed libel of E. Sanchez & Company.

[fol. 2]

Dec. 21. Filed libel of Austin Nichols & Company.
1918.
May 16. Filed answer to the libel of Austin Nichols & Company.
1918.
May 17. Filed answer to libel of E. Sanchez & Company.
1919.
May 27. Issued Commission to Seville, Spain.
1922.
March 18. Filed commission and deposition from Seville, Spain.
Sept. 29. Filed libel of E. Tolibia & Company.
" 29. Filed stipulation consolidating cases for trial.
Oct. 3. Cause called and tried (A. N. Hand, J.), for libellants, four witnesses sworn, and three exhibits put in. For claimant six witnesses sworn, eleven depositions and ten exhibits put in.
Argued and submitted.
" 23. Filed opinion, libels dismissed.
Nov. 6. Filed answer to libel of E. Tolibia & Company.
" 9. Filed final decree.

Dec. 4. Filed order consolidating cases for appeal.
" 5. Filed notice of appeal.
" 5. Filed assignment of errors.

[fol. 3] IN UNITED STATES DISTRICT COURT

LIBEL

(Austin Nichols & Company)

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel and complaint of Austin Nichols & Co., Inc., a corporation against the Steamship "Isla de Panay," her engines, boilers, etc., in a cause of cargo damage, civil and maritime, alleges and respectfully shows on information and belief to this Honorable Court as follows:

First. Your libellant is a corporation, duly organized, created and existing under and by virtue of the laws of the State of New York, with an office and place of business at No. 100 Hudson Street, in the Borough of Manhattan, City of New York, and is the owner of the damaged merchandise hereinafter mentioned.

Second. The steamship "Isla De Panay" is now and will be during the pendency of process hereunder, within the Southern District of New York, and within the jurisdiction of this Honorable Court.

Third. On October 27th, 1917, Rowlett Y Pyman, shipped and placed on board the steamship "Isla De Panay" then lying at the port [fol. 4] of Cadiz, Spain two hundred and twenty-seven (227) packages of olives in good order and condition to be carried by the said steamship "Isla de Panay" as a common carrier from the port of Cadiz to the port of New York and there to be delivered in like good order and condition as when shipped to your libellant in accordance with the terms of bills of lading then and there issued for the said shipment and in consideration of an agreed freight.

Fourth. Thereafter the said steamship "Isla de Panay" sailed from the port of Cadiz and arrived at the port of New York in the month of November, 1917, and there discharged her cargo, but not in like good order and condition as when shipped but badly damaged.

Fifth. By reason of the premises, your libellant has sustained damage in about the sum of Eleven Thousand ($11,000) Dollars, as nearly as the same can now be estimated, no part of which has been paid, although duly demanded.

Sixth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form of law according to the course and practice of this Honorable Court in causes of [fol. 5] Admiralty and Maritime jurisdiction, issue against the said steamship "Isla de Panay," her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this Honorable Court be pleased to decree to your libellant its damages, with interest and costs, and that the steamship "Isla de Panay," her engines, etc., be condemned and sold to satisfy the same, and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

Harrington, Bingham & Englar, Proctors for Libellant, No. 64 Wall Street, New York City.

[fol. 6] Jurat showing the foregoing was duly sworn to by E. F. Bushnell omitted in printing.

[fol. 7] In United States District Court

ANSWER

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of Compania Trasatlantica, claimant and owner of the Steamship "Isla de Panay" to the libel and Complaint of Austin, Nichols & Co., Inc., against the Spanish Steamship "Isla de Panay" her engines, etc., in a cause of contract and cargo damage, civil and maritime alleges and respectfully shows to this Honorable Court as follows:

First. It denies any knowledge or information sufficient to form a belief as to the allegations set forth in paragraph marked "First" of the libel herein.

Second. It admits the allegations set forth in paragraph marked "Second" of the libel herein.

Third. It admits and alleges that on or about the 6th day of November, 1917, there were shipped on board the steamship "Isla de Panay" then at the port of Cadiz Spain and bound for the Port of New York, 227 casks said to contain olives, the weight and contents of said casks and their quality, however, being stated to be known to [fol. 8] the claimant, which expressly declined to be responsible therefor.

It further admits and alleges that it was agreed that the merchandise should be transported for a stipulated freight to the Port of New York and there be delivered to the order of the libellant subject to the conditions and exceptions from liability contained in the bills of lading issued for said merchandise at Seville, Spain, from which port said merchandise was shipped; in the first instance.

Further answering it denies each and every allegation set forth in paragraph marked "Third" of the libel herein except as hereinabove expressly admitted or denied.

Fourth. It admits and alleges that thereafter the steamship "Isla de Panay" sailed from the Port of Cadiz, Spain and arrived in due course at the Port of New York in the month of November, 1917, and that it thereafter delivered at the Port of New York all of the above mentioned merchandise which it received on board the ship at Cadiz in pursuance of and in compliance with the terms and conditions of the bills of lading hereinabove referred to.

Further answering it denies each and every allegation set forth in paragraph marked "Fourth" of the libel herein except as hereinabove expressly admitted or denied.

Fifth. It admits and alleges that the libellant has demanded pay-[fol. 9] ment of its alleged damage and that payment thereof has been refused but denies that any damage was suffered by the libellant.

Further answering it denies each and every allegation set forth in paragraph marked "Fifth" of the libel herein except as hereinabove expressly admitted or denied.

Sixth. It admits the jurisdiction of this Honorable Court but denies the truth of the premises.

Further answering the libel herein as a first, separate and distinct defense herein, and re-alleging the denials and allegations hereinabove pleaded as if they were again set out in full, the claimant alleges:

Seventh. I. That the bills of lading for the carriage of the said merchandise hereinabove referred to contained, among others, the following provisions, terms and stipulations, subject to which the carriage was expressly made:

"7. The Company is not responsible for damages or losses caused by the sea, the winds * * * or any unforseen cause, or occasioned by juridical acts of any class and nature of the captain, crew or lightermen, the parties interested in the cargo expressly renouncing the right to demand any civil responsibility, direct or subsidiary, which may arise from the laws and especially from Articles 587, 618 and 620 of the Commercial Code and from Article 21 [fol. 10] of the Penal Code (of Spain). Also not responsible for the contents, weight and quality of the packages; for damage caused by other goods; for errors in delivering same caused by insufficient or illegible marking or for breakage of the articles and fragile containers. Also not responsible for loss, damage and average caused to the goods by rats or other rodents."

"10. The unloading is to be done by the vessel, however, for the account and risk of the receivers, according to the tariff or custom of each port, the agent of the vessel being authorized to present the Declarations at the Customs in accordance with the contents of the bill of lading."

"11. Delivery must be taken upon the unloading of the goods, the packages to be exchanged for the bills of lading after the payment of the freight in case the same has not been paid at the time of loading * * *. Not responsible for misplacement or damage to goods that have not been received by the interested parties at the moment of unloading * * *. It is understood that from the moment the goods have left the deck of the vessel, marine risks, damages, etc., are for the account of the receivers."

"18. Even though this bill of lading is not signed by the shipper, the shipper, by taking this bill of lading, agrees to all the conditions of same."

[fol. 11] II. The claimant exercised due diligence to make the steamship "Isla de Panay" in all respects seaworthy and properly manned, equipped and supplied for the voyage mentioned in the libel, and the steamship "Isla de Panay" was in fact in all respects seaworthy, properly manned, equipped and supplied at the beginning of such voyage, and the cargo was in every respect properly loaded, stowed, cared for and delivered.

III. If there was any loss of or damage to any of the merchandise referred to in the libel herein, which is not admitted, it was caused by one or more of the following causes mentioned in the exemptions in the above enumerated causes of the bills of lading: (a) the sea; (b) the winds; (c) unforeseen cause; (d) juridical acts of the captain, crew or lightermen; (e) damage caused by other goods; (f) insufficient or illegible marking; (h) breakage of articles; (i) fragile containers; (j) to other causes excepted by the bills of lading hereinbefore referred to from liability for which the steamship "Isla de Panay" and the claimant, by the conditions and exceptions in the said bills of lading are expressly excluded.

IV. That if the said alleged damage to the libellant's merchandise was occasioned by the negligence of the claimant's servants and employees, which is not admitted, the claimant herein is not responsible therefor, by reason of the clause numbered "7" of the bill of lading, providing, part, as follows:

[fol. 12] "The Company is not responsible for damages or losses caused by * * * juridicial acts of any class and nature of the captain, crew or lightermen, the parties interested in the cargo expressly renouncing the right to demand any civil responsibility, direct or subsidiary, which may arise from the laws and especially from Articles 587, 618 and 620 of the Commercial Code, and from Article 21 of the Penal Code (of Spain)."

That Section 618 of the Commercial Code of Spain, its rights under which the libellant by the aforesaid stipulation has expressly renounced, provides in part as follows:

"The captain shall be civilly liable to the ship owner and the ship owner to the third parties having contracted with him:

1st. For all the damages the ship or her cargo may suffer from lack of skill or mismanagement."

V. That if any damage was caused to the libellant's merchandise by the claimant's servants and employees, which is not admitted, it was occasioned by the juridical acts of the captain, crew or lightermen of the claimant in which event the steamship "Isla de Panay" and the claimant are exempt from liability by the stipulation referred to in the preceding subdivision of this paragraph, which said stipulation exempts the claimant from liability in any event regardless of whether the acts of the captain, crew or lightermen were acts of negligence or not and which stipulation is valid and binding [fol. 13] under the laws of the Kingdom of Spain which govern the contract of transportation herein referred to; by reason whereof neither the said vessel nor the claimant is under any circumstances liable to the libellant for any damage which the libellant's merchandise may have suffered.

VI. If any of the alleged loss of or damage to the libellant's goods occurred after their removal from the steamship "Isla de Panay," said vessel and the claimant are not res-onsible therefore by reason of the stipulations and exemptions of the bills of lading, providing as follows:

1. The unloading is to be done by the vessel, however, for the account and risk of the receivers.

2. Delivery must be taken upon the unloading of the goods, * * * and the Company is not responsible for misplacement or damage to goods which have not been received by the interested parties at the moment of unloading.

3. It is understood that from the moment the goods have left the deck of the vessel, marine risks, damages, etc., are for the account of the receivers.

Eighth. In case there was any loss of or damage to the cargo mentioned in the libel, which is not admitted, it was not caused or [fol. 14] contributed to in any manner whatsoever by any negligence on the part of the steamship "Isla de Panay," her agents, or the claimant, or its agents and servants, or any one for whom the steamship "Isla de Panay," or the claimant may have been responsible, and by reason of the fact that the damage and loss, if any, was caused within the exceptions of the bills of lading hereinabove set forth, the said vessel and the claimant are not responsible to the libellant therefor.

Ninth. The claimant further alleges that it and the steamship "Isla de Panay" have performed all and singular the duties and obligations laid upon them under the bills of lading which constituted the contracts for the carriage of the goods mentioned in the libel herein.

Further answering the libel herein and as a second separate and distinct defense herein, and re-alleging the denials and allegations hereinabove pleaded as if they were set out in full, the claimant alleges:

I. Under and by the Act of Congress, approved February 13, 1893, entitled "An Act Relating to the navigation of Vessels, etc.," it is provided that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects [fol. 15] seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative.

II. At the times mentioned in the libel the steamship "Isla de Panay" was engaged in the transportation of such of the merchandise hereinbefore referred to as was aboard her from ports in the Kingdom of Spain to a port in the United States of America, and the claimant had exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, in pursuance of and in accordance with the terms and provisions of said act.

III. The damage to and loss of the libellant's goods, if any, was due to and caused by causes within the exceptions provided as above by the said act of February 13, 1893, and was due either [fol. 16] to a fault or error in navigation or in the management of the vessel or to the inherent defect, quality or vice of the thing carried or to the insufficiency of the containers in which the libellant's goods were carried or to an act or omission of the shippers or owners of the goods, their agent or representative, by reason whereof the steamship "Isla de Panay" and the claimant are exempted from any liability to the libellant in the premises.

Tenth. That the claimant is ignorant of the specific charges of fault intended to be proved or urged at the trial, and is, therefore, unable to plead more specifically to the charges, but avers that the alleged loss, if any, mentioned in the libel was within one or more of the above quoted exceptions of the bills of lading, to which the claimant begs leave to refer on the trial, and that the said alleged loss was thereby to be borne by the owners of the cargo and not by the vessel nor the claimant.

Eleventh. All and singular the premises are true.

Wherefore, the claimant prays that the libel herein be dismissed with costs, and for such other and further relief as may be just.

Hunt, Hill & Betts, Proctors for Claimant, Office & P. O. Address, 120 Broadway, Borough of Manhattan, New York City.

[fol. 17] Jurat showing the foregoing was duly sworn to by L. Llanso; omitted in printing.

[fol. 18] IN UNITED STATES DISTRICT COURT

LIBEL

(Sanchez & Company)

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Libel and Complaint of Eug. Sanchez and Jose Gilde Sagredo, copartners trading as E. Sanchez & Co., against the Steamship "Isla de Panay," her engines, boilers, etc., in a cause of cargo damage, civil and maritime, alleges and respectfully shows on information and belief to this Honorable Court as follows:

First. Your libellants are co-partners trading under the firm name and style of E. Sanchez & Co., with an office and place of business at No. 155 Front Street, in the Borough of Manhattan, City of New York, and are the owners of the damaged merchandise hereinafter mentioned.

Second. The steamship "Isla de Panay" is now within the Southern District of New York and within the jurisdiction of this Honorable Court.

Third. On October 27th, 1917, Joseph Y. de Ferry, shipped and [fol. 19] placed on board the steamship "Isla de Panay," then lying at the Port of Cadiz, Spain, One hundred (100) packages of olives in good order and condition to be carried by the said steamship "Isla de Panay," as a common carrier, from the Port of Spain to the Port of New York, and there to be delivered to your libellants in like good order and condition as when shipped, in consideration of an agreed freight, and in accordance with the valid terms of a bill of lading then and there issued.

Fourth. Thereafter the said steamship "Isla de Panay," sailed from the Port of Cadiz, Spain to the Port of New York in the month of November, 1917, and made delivery of the cargo as aforesaid, but not in like good order and condition as when shipped, but badly damaged.

Fifth. By reason of the premises, your libellants have sustained damage in about the sum of Eighteen hundred ($1,800.00) Dollars, as nearly as the same can now be estimated, no part of which has been paid although duly demanded.

Sixth. All and singular the premises are true, and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellants pray that process in due form of law according to the course and practice of this Honorable Court in causes of Admiralty and Maritime jurisdiction, issue against the said [fol. 20] steamship "Isla de Panay," her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this Honorable Court be pleased to decree to your libellants their damages, with interest and costs, and that the steamship "Isla de Panay," her engines, etc., be condemned and sold to satisfy the same, and that your libel-ants may have such other and further relief as in law and justice they may be entitled to receive.

Harrington, Bigham & Englar, Proctors for Libellants, No. 64 Wall Street, Borough of Manhattan, City of New York.

[fol. 21] Jurat showing the foregoing was duly sworn to by Eugene Sanchez; omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

ANSWER

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Answer of Compania Trasatlantica Claimant and Owner of the Steamship "Isla de Panay," to the libel and Complaint of Eug. Sanchez and Jose Gilde Sagredo, co-partners trading as E. Sanchez & Co., against the Spanish Steamship "Isla de Panay," her engines, etc., in a cause of contract and cargo, damage, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

First. It denies any knowledge or information sufficient to form a belief as to the allegations set forth in paragraph marked "First" of the libel herein.

Second. It admits the allegations set forth in paragraph marked "Second" of the libel herein.

Third. It admits and alleges that on or about the 6th day of November, 1917, there were shipped on board the steamship "Isla de Panay," then at the Port of Cadiz Spain and bound for the Port of New York, 100 casks said to contain olives, the weight and con- [fol. 23] tents of said casks and their quality, however, being stated to be unknown to the claimant, which expressly declined to be responsible therefor.

It further admits and alleges that it was agreed that the merchandise should be transported for a stipulated freight to the Port of New York and there be delivered to the order of the libelants subject to the conditions and exceptions from liability contained in the bill of lading issued for said merchandise at Seville, Spain, from which port said merchandise was shipped, in the first instance.

Further answering it denies each and every allegation set forth in paragraph marked "Third" of the libel herein except as hereinabove expressly admitted or denied.

Fourth. It admits and alleges that thereafter the steamship "Isla de Panay" sailed from the Port of Cadiz, Spain, and arrived in due course at the Port of New York in the month of November, 1917, and that it thereafter delivered at the Port of New York all of the above mentioned merchandise which it received on board the ship at Cadiz in pursuance of and in compliance with the terms and conditions of the bill of lading hereinabove referred to.

Further answering it denies each and every allegation set forth in paragraph marked "Fourth" of the libel herein except as hereinabove expressly admitted or denied.

Fifth. It admits and alleges that the libellants have demanded [fol. 24] payment of their alleged damage and that payment thereof has been refused but denies that any damage was suffered by the libellants.

Further answering it denies each and every allegation set forth in paragraph marked "Fifth" of the libel herein except as hereinabove expressly admitted or denied.

Sixth. It admits the jurisdiction of this Honorable Court but denies the truth of the premises.

Further answering the libel herein and as a first, separate and distinct defense herein, and re-alleging the denials and allegations hereinabove pleaded as if they were again set out in full, the claimant alleges:

Seventh. 1. That the bill of lading for the carriage of the said merchandise hereinabove referred to contained among others, the following provisions, terms and stipulations, subject to which the carriage was expressly made:

"7. The Company is not responsible for damages or losses caused by the sea, the winds * * * or any unforeseen cause, or occasioned by juridical acts of any class and nature of the captain, crew or lightermen, the parties interested in the cargo expressly renouncing the right to demand any civil responsibility direct or subsidiary, [fol. 25] which may arise from the laws and especially from Articles 587, 618 and 620 of the Commercial Code and from Article 21 of the Penal Code (of Spain.) Also not responsible for the contents, weights and quality of the packages; for damage caused by other goods; for errors in delivering same caused by insufficient or illegible marking or for breakage of the articles and fragile containers. Also not responsible for loss, damage and average caused to the goods by rats or other rodents."

"10. The unloading is to be done by the vessel, however, for the account and risk of the receivers, according to the tariff or custom of each port, the agent of the vessel being authorized to present

the Declaration at the Customs in accordance with the contents of the bill of lading."

"11. Delivery must be taken upon the unloading of the goods, the packages to be exchanged for the bills of lading after the payment of the freight in case the same has not been paid at the time of loading * * *. Not responsible for misplacement or damage to goods that have not been received by the interested parties at the moment of unloading * * *. It is understood that from the moment the goods have left the deck of the vessel, marine risks, damages, etc., are for the account of the receivers."

"18. Even though this bill of lading is not signed by the shipper, [fol. 26] the shipper, by taking this bill of lading agrees to all the conditions of same."

II. The claimant exercised due diligence to make the steamship "Isla de Panay" in all respects seaworthy and properly manned, equipped and supplied for the voyage mentioned in the libel, and the steamship "Isla de Panay" was in fact in all respects seaworthy, properly manned, equipped and supplied at the beginning of such voyage, and the cargo was in every respect properly loaded, stowed, cared for and delivered.

III. If there was any loss of or damage to any of the merchandise referred to in the libel herein, which is not admitted, it was caused by one or more of the following causes mentioned in the exemptions in the above enumerated clauses of the bill of lading: (a) the sea; (b) the winds; (c) unforeseen cause; (d) juridical acts of the captain, crew or lightermen; (e) damage caused by other goods; (f) insufficient or illegible marking; (h) breakage of the articles; (i) fragile containers; (j) to other causes excepted by the bill of lading hereinbefore referred to from liability for which the steamship "Isla de Panay" and the claimant, by the conditions and exceptions in the said bill of lading are expressly excluded.

IV. That if the said alleged damage to the libellants' merchandise was occasioned by the negligence of the claimant's servants and em- [fol. 27] ployees, which is not admitted, the claimant herein is not responsible therefor, by reason of the clause numbered "7" of the bill of lading, providing, in part, as follows:

"The Company is not responsible for damages or losses caused by * * * juridical acts of any class and nature of the captain, crew or lightermen, the parties interested in the cargo expressly renouncing the right to demand any civil responsibility, direct or subsidiary, which may arise from the laws and especially from Articles 587, 618 and 620 of the Commercial Code, and from Article 21 of the Penal Code (of Spain)."

That Section 618 of the Commercial Code of Spain, their rights under which the libellants by the aforesaid stipulation have expressly renounced, provides in part as follows:

"The captain shall be civilly liable to the ship owner and the ship owner to the third parties having contracted with him.

1st. For all the damages the ship or her cargo may suffer from lack of skill or mismanagement."

V. That if any damage was caused to the libellants' merchandise by the claimant's servants and employees, which is not admitted, it was occasioned by the juridical acts of the captain, crew or lightermen of the claimant, in which event the Steamship "Isla de Panay" and the claimant are exempt from liability by the stipulation re- [fol. 28] ferred to in the preceding subdivision of this paragraph, which said stipulation exempts the claimant from liability in any event regardless of whether the acts of the captain, crew or lightermen were acts of negligence or not and which stipulation is valid and binding under the laws of the Kingdom of Spain which govern the contract of transportation herein referred to; by reason whereof neither the said vessel nor the claimant is under any circumstances liable to the libellants for any damage which the libellants' merchandise may have suffered.

VI. If any of the alleged loss of or damage to the libellants' goods occurred after their removal from the steamship "Isla de Panay," said vessel and the claimant are not responsible therefor by reason of the stipulation and exemptions of the bill of lading, providing as follows:

1. The unloading is to be done by the vessel, however, for the account and risk of the receivers.

2. Delivery must be taken upon the unloading of the goods. * * * and the Company is not responsible for misplacement or damage to goods which have not been received by the interested parties at the moment of unloading.

3. It is understood that from the moment the goods have left the deck of the vessel, marine risks, damages, etc., are for the account of the receivers.

[fol. 29] Eighth. In case there was any loss of or damage to the cargo mentioned in the libel, which is not admitted, it was not caused or contributed to in any manner whatsoever by any negligence on the part of the steamship "Isla de Panay," her agents, or the claimant, or its agents and servants, or anyone for whom the steamship "Isla de Panay," or the claimant may have been responsible, and by reason of the fact that the damage and loss, if any, was caused within the exceptions of the bill of lading hereinabove set forth, the said vessel and the claimant are not responsible to the libellants therefor.

Ninth. The claimant further alleges that it and the steamship "Isla de Panay" have performed all and singular the duties and obligations laid upon them under the bill of lading which constituted the contracts for the carriage of the goods mentioned in the libel herein.

Further answering the libel herein and as a second separate and distinct defense herein, and re-alleging the denials and allegations hereinabove pleaded as if they were again set out in full, the claimant alleges:

I. Under and by the Act of Congress, approved February 13, 1893, entitled, "An Act Relating to the navigation of Vessels, etc." it is provided that if the owner of any vessel transporting merchandise [fol. 30] or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative.

II. At the times mentioned in the libel the steamship "Isla de Panay" was engaged in the transportation of such of the merchandise hereinbefore referred to as was aboard her from ports in the Kingdom of Spain to a port in the United States of America, and the claimant had exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, in pursuance of and in accordance with the terms and provisions of said Act.

III. The damage to and loss of the libellants' goods, if any, was due to and caused by causes within the exceptions provided as above by the said Act of February 13, 1893, and was due either to a fault [fol. 31] or error in navigation or in the management of the said vessel or to the inherent defect, quality or vice of the thing carried or to the insufficiency of the containers in which the libellants' goods were carried or to an act or omission of the shippers or owners of the goods, their agent or representative, by reason whereof the Steamship "Isla de Panay" and the claimant are exempted from any liability to the libellants in the premises.

Tenth. That the claimant is ignorant of the specific charges of fault intended to be proved or urged at the trial, and is, therefore, unable to plead more specifically to the charges, but avers that the alleged loss, if any, mentioned in the libel was within one or more of the above quoted exceptions of the bill of lading, to which the claimant begs leave to refer on the trial, and that the said alleged loss was thereby to be borne by the owners of the cargo and not by the vessel nor the claimant.

Eleventh. All and singular the premises are true.

Wherefore the claimant prays that the libel herein be dismissed with costs, and for such other and further relief as may be just.

Hunt, Hill & Betts, Proctors for Claimant, Office & Post Office Address 120 Broadway, Borough of Manhattan, New York City.

[fol. 32] Jurat showing the foregoing was duly sworn to by L. Llanso; omitted in printing.

[fol. 33] IN UNITED STATES DISTRICT COURT

LIBEL

(E. Tolibia & Company)

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel and complaint of E. Tolibia & Company, a corporation, against The Steamship "Isla de Panay," her engines, boilers, etc., in a cause of cargo damage, civil and maritime, alleges and respectfully shows on information and belief to this Honorable Court as follows:

First. Your libellant is a corporation organized under the laws of the State of New York, having its office and place of business at No. 24 Renwick Street, in the City of New York, and is the owner of the damaged merchandise hereinafter mentioned.

Second. The Steamship "Isla de Panay" is now within the Southern District of New York and within the jurisdiction of this Honorable Court.

Third. On October 27th, 1917, there were shipped on board the steamship "Isla de Panay" then lying in the port of Cadiz, Spain, [fol. 34] twenty-seven (27) packages of olives in good order and condition to be carried by the said steamship "Isla de Panay," as a common carrier, from the port of Spain to the port of New York, and there to be delivered to your libellant in like good order and condition as when shipped, in consideration of an agreed freight, and in accordance with the valid terms of a bill of lading then and there issued.

Fourth. Thereafter the said steamship "Isla de Panay," sailed from the port of Cadiz, Spain, to the port of New York in the month of November, 1917, and made delivery of the cargo as aforesaid, but not in like good order and condition as when shipped, but badly damaged.

Fifth. By reason of the premises, your libellant has sustained damage in about the sum of Five hundred ($500.00) Dollars, as nearly as the same can now be estimated, no part of which has been paid although duly demanded.

Sixth. All and singular the premises are true, and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form of law according to the course and practice of this Honorable Court in causes of Admiralty and Maritime jurisdiction, issue against the said steamship "Isla de Panay," her engines, boilers, etc. and that all persons [fol. 35] having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this Honorable Court be pleased to decree to your libellant its damages, with interest and costs, and that the steamship "Isla de Panay" her engines, etc., be condemned and sold to satisfy the same and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

Bigham, Englar & Jones, Proctors for Libellant, No. 64 Wall Street, Borough of Manhattan, City of New York.

[fol. 36] Jurat showing the foregoing was duly sworn to by T. Catesby Jones; omitted in printing.

[fol. 37] IN UNITED STATES DISTRICT COURT

ANSWER

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Answer of Compania Trasatlantica, Claimant and Owner of the Steamship "Isla de Panay" to the Libel and Complaint of E. Tolibia & Company against the Spanish Steamship "Isla de Panay," her engines, etc., in a cause of contract and cargo damage, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

First. It denies any knowledge or information sufficient to form a belief as to the allegations set forth in paragraph marked "First" of the libel herein.

Second. It denies the allegations set forth in paragraph marked "Second" of the libel herein.

Third. It admits and alleges that on or about the 6th day of November, 1917 there were shipped on board the steamship "Isla de Panay" then at the port of Cadiz, Spain and bound for the Port of New York, 27 casks said to contain olives, the weight and contents of said casks and their quality, however, being stated to be unknown [fol. 38] to the claimant, which expressly declined to be responsible therefore.

It further admits and alleges that it was agreed that the merchandise should be transported for a stipulated freight to the port of New

York and there be delivered to the order of the libellant subject to the conditions and exceptions from liability contained in the bill of lading issued for said merchandise at Seville, Spain, from which port said merchandise was shipped, in the first instance.

Further answering it denies each and every allegation set forth in paragraph marked "Third" of the libel herein except as hereinabove expressly admitted or denied.

Fourth. It admits and alleges that thereafter the steamship "Isla de Panay" sailed from the port of Cadiz, Spain and arrived in due course at the port of New York in the month of November, 1917, and that it thereafter delivered at the port of New York all of the above mentioned merchandise which it received on board the ship at Cadiz in pursuance of and in compliance with the terms and conditions of the bill of lading hereinabove referred to.

Further answering it denies each and every allegation set forth in paragraph marked "Fourth" of the libel herein except as hereinabove expressly admitted or denied.

Fifth. It admits and alleges that the libellant has demanded payment of its alleged damage and that payment thereof has been re-
[fol. 39] fused but denies that any damage was suffered by the libellant.

Further answering it denies each and every allegation set forth in paragraph marked "Fifth" of the libel herein except as hereinabove expressly admitted or denied.

Sixth. It admits the jurisdiction of this Honorable Court but denies the truth of the premises.

Further answering the libel herein and as a first, separate and distinct defence herein, and re-alleging the denials and allegations hereinabove pleaded as if they were again set out in full, the claimant alleges:

Seventh: I. That the bill of lading for the carriage of the said merchandise hereinabove referred to contained, among others the following provisions, terms and stipulations, subject to which the carriage was expressly made:

"7. The Company is not responsible for damages or losses caused by the sea, the winds * * * or any unforeseen cause, or occasioned by juridical acts of any class and nature of the captain, crew or lightermen, the parties interested in the cargo expressly renouncing the right to demand any civil responsibility, direct or subsidiary, which may arise from the laws and especially from Articles 587, 618 and 620 of the Commercial Code and from Article 21 of
[fol. 40] the Penal Code (of Spain). Also not responsible for the contents, weight and quality of the packages; for damage caused by other goods; for errors in delivering same caused by insufficient or illegible marking or for breakage of the articles and fragile containers. Also not responsible for loss, damage and average caused to the goods by rats or other rodents."

"10. The unloading is to be done by the vessel, however, for the account and risk of the receivers, according to the tariff or custom of each port, the agent of the vessel being authorized to present the Declaration at the Customs in accordance with the contents of the bill of lading."

"11. Delivery must be taken upon the unloading of the goods, the packages to the exchanged for the bills of lading after the payment of the freight in case the same has not been paid at the time of loading * * * Not responsible for misplacement or damage to goods that have not been received by the interested parties at the moment of unloading. * * * It is understood that from the moment the goods have left the deck of the vessel, marine risks, damages, etc., are for the account of the receivers."

18. Even though this bill of lading is not signed by the shipper, the shipper, by taking this bill of lading, agrees to all the conditions of same."

[fol. 41] 11. The claimant exercised due diligence to make the steamship "Isla de Panay" in all respects seaworthy and properly manned, equipped and supplied for the voyage mentioned in the libel, and the Steamship "Isla de Panay" was in fact in all respects seaworthy, properly manned, equipped and supplied at the beginning of such voyage, and the cargo was in every respect properly loaded, stowed, cared for and delivered.

III. If there was any loss of or damage to any of the merchandise referred to in the libel herein, which is not admitted, it was caused by one or more of the following causes mentioned in the exemptions in the above enumerated clauses of the bill of lading: (a) the sea; (b) the winds; (c) unforeseen cause; (d) juridical acts of the captain, crew or lightermen; (e) damage caused by other goods; (f) insufficient or illegible marking; (h) breakage of articles; (i) fragile containers; (j) to other causes excepted by the bill of lading hereinbefore referred to from liability for which the Steamship "Isla de Panay" and the claimant, by the conditions and exceptions in the said bill of lading are expressly excluded.

IV. That if the said alleged damage to the libellant's merchandise was occasioned by the negligence of the claimant's servants and employees, which is not admitted, the claimant herein is not responsible therefor, by reason of the clause numbered "7" of the bill of lading, providing, in part, as follows:

[fol. 42] "The Company is not responsible for damages or losses caused by * * * Juridical acts of any class and nature of the captain, crew or lightermen, the parties interested in the cargo expressly renouncing the right to demand any civil responsibility, direct or subsidiary, which may arise from the laws and especially from Articles 587, 618 and 620 of the Commercial Code, and from Article 21 of the Penal Code (of Spain)."

That Section 618 of the Commercial Code of Spain, its rights under which the libellant by the aforesaid stipulation has expressly renounced, provides in part as follows:

"The captain shall be civilly liable to the ship owner and the ship owner to the third parties having contracted with him:
1st. For all the damages the ship or her cargo may suffer from lack of skill or mismanagement."

V. That if any damage was caused to the libellant's merchandise by the claimant's servants and employees, which is not admitted, it was occasioned by the juridical acts of the captain, crew or lightermen of the claimant, in which event the Steamship "Isla de Panay" and the claimant are exempt from liability by the stipulation referred to in the preceding subdivision of this paragraph, which said stipulation exempts the claimant from liability in any event regardless of whether the acts of the captain, crew or lightermen were acts of [fol. 43] negligence or not and which stipulation is valid and binding under the laws of the Kingdom of Spain which govern the contract of transportation herein referred to; by reason whereof neither the said vessel nor the claimant is under any circumstances liable to the libellant for any damage which the libellant's merchandise may have suffered.

VI. If any of the alleged loss of or damage to the libellant's goods occurred after their removal from the Steamship "Isla de Panay," said vessel and the claimant are not responsible therefor by reason of the stipulations and exemptions of the bills of lading, providing as follows:

1. The unloading is to be done by the vessel, however, for the account and risk of the receivers.

2. Delivery must be taken upon the unloading of the goods, * * * and the Company is not responsible for misplacement or damage to goods which have not been received by the interested parties at the moment of unloading.

3. It is understood that from the moment the goods have left the deck of the vessel, marine risks, damages, etc., are for the account of the receivers.

Eighth. In case there was any loss of or damage to the cargo mentioned in the libel which is not admitted, it was not caused or con- [fol. 44] tributed to in any manner whatsoever by any negligence on the part of the Steamship "Isla de Panay," her agents, or the claimant, or its agents and servants, or anyone for whom the Steamship "Isla de Panay," or the claimant may have been responsible, and by reason of the fact that the damage and loss, if any, was caused within the exceptions of the bill of lading hereinabove set forth, the said vessel and the claimant are not responsible to the libellant therefor.

Ninth. The claimant further alleges that it and the Steamship "Isla de Panay" have performed all and singular the duties and

obligations laid upon them under the bill of lading which constituted the contract for the carriage of the goods mentioned in the libel herein.

Further answering the libel herein, and as a second separate and distinct defence herein, and re-alleging the denials and allegations hereinabove pleaded as if they were again set out in full, the claimant alleges:

Tenth. Under and by the Act of Congress, approved February 13, 1893, entitled "An Act Relating to the navigation of Vessels, etc.", it is provided that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the [fol. 45] vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative.

Eleventh. At the times mentioned in the libel the Steamship "Isla de Panay" was engaged in the transportation of such of the merchandise hereinbefore referred to as was aboard her from ports in the Kingdom of Spain to a port in the United States of America, and the claimant had exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, in pursuance of and in accordance with the terms and provisions of said Act.

Twelfth. The damage to and loss of the libellant's goods, if any, was due to and caused by causes within the exceptions provided as above by the said Act of February 13, 1893, and was due either to a fault or error in navigation or in the management of the said vessel or to the inherent defect, quality or vice of the thing carried or to the insufficiency of the containers in which the libellant's [fol. 46] goods were carried or to an act or omission of the shippers or owners of the goods, their agent or representative, by reason whereof the Steamship "Isla de Panay" and the claimant are exempted from any liability to the libellant in the premises.

Further answering the libel herein, and as a third separate and distinct defence herein, and re-alleging the denials and allegations hereinabove pleaded as if they were again set out in full, the claimant alleges:

Thirteen. That whatever claim the libellant may have had herein arose in the month of November, 1917 and therefore such claim which is now made the basis of this suit almost five years after it

arose, is a stale claim, and because of the laches of the libellant herein in not beginning suit on the said claim, the libel herein should be dismissed.

Fourteenth. That the claimant is ignorant of the specific charges of fault intended to be proved or urged at the trial, and is, therefore, unable to plead more specifically to the charges, but avers that the alleged loss, if any, mentioned in the libel was within one or more of the above quoted exceptions of the bill of lading, to which the claimant begs leave to refer on the trial and that the said alleged loss was thereby to be borne by the owners of the cargo and not by the vessel nor the claimant.

[fols. 47 & 48] Fifteenth. All and singular the premises are true.

Wherefore, the claimant prays that the libel herein be dismissed with costs, and for such other and further relief as may be just.

Hunt, Hill & Betts, Proctors for Claimant, Office & Post Office Address 120 Broadway, Borough of Manhattan, New York City.

Jurat showing the foregoing was duly sworn to by John W. Crandall; omitted in printing.

[fol. 49] **Case.**

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

The Claims of the libels and answers are stated.

[fol. 50] TESTIMONY FOR THE LIBELANTS

J. D. SAGREDO, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Woodruff:

Q. What is your address?
A. 194 Water Street.
Q. And your present occupation?
A. Importer of olives.
Q. What is the name of your firm?
A. E. Sanchez & Co.
Q. They are the libelants in one of these actions against the Steamship Isla de Panay?
A. They are.
Q. Are you a member of that firm?
A. Yes.

Q. How long have you been a member?
A. Since 1913.
Q. What are your general duties in connection with the matters such as are involved in this case?
A. The general run of the business.
Q. Do you remember a consignment of 100 casks of olives to your firm, E. Sanchez & Company from Jose y de Terry consigned to this country in November, 1917?
A. I do.
Q. They came by the steamship Isla de Panay of the Spanish Line?
A. They did.
Q. Where did she dock?
A. At pier 8, East River.
[fol. 51] Q. I show you bill of lading, Claimant's Exhibit 2, and ask you if you can identify that?
A. Yes.
Q. What is that bill of lading?
A. What do you mean?
Q. Is that the bill of lading covering the shipment to which you have testified?
A. It is.
Q. Is that a clean bill of lading, what you call a clean bill of lading?

Mr. Crandall: I object; it speaks for itself.

Q. Did you at the time you received this bill of lading have your attention called to the fact that it was a clean bill of lading? Did you notice whether it was clean or whether it contained notations?
A. It was a clean bill of lading.
Q. After receiving that bill of lading what did you do in connection with the shipment of olives?
A. I accepted the draft.
Q. In payment?
A. In payment of the olives.
Q. Did you do that in the ordinary course of business?
A. I did.
Q. Are you in the habit of receiving consignments of olives from Spain? Do you do this from time to time?
A. Absolutely, yes.
Q. Can you give the Court any idea as to how many consignments of olives of this nature you are in the habit of receiving say in a year?
A. Well, it depends; about once a month.
Q. If this bill of lading had contained notations would you have accepted the same in the course of business?

[fol. 52] Objected to as incompetent, irrelevant and immaterial.
Objection sustained.
Exception.

Q. Have you in the course of your business ever accepted any bill of lading for consignments of olives containing notations as to insufficient containers?

Same objection.
Objection overruled.
Exception.

A. No.
Q. Did you or any one of your firm to your knowledge have any knowledge or information as to any defective condition of these containers when they were received for shipment in Spain?
A. No.
Q. You purchased these goods in the ordinary course of business, I think you have testified?
A. Yes.
Q. Did you examine these goods on the dock or on the steamer, did you examine them at pier 8?
A. On the dock.
Q. Not on the steamer?
A. No.
Q. About how many casks were on the dock when you made your examination?
A. I don't quite remember.
Q. A large number or just a few?
A. There were 100 casks in all, and I don't remember just exactly.
Q. What condition did you find them in, the casks and the contents on the wharf?
A. Well, rather poor.
[fol. 53] Q. Explain in what way they were poor?
A. Casks without brine spoil the olives.
Q. Were the casks broken or how were they?
A. Some of them were broken.
Q. How were the heads?
A. Some were in and some were out.
Q. Did you notice the hoops on these casks, any of them?
A. Not exactly.
Q. You don't remember about that?
A. I don't remember about that now.
Q. Can you tell us anything more in connection with the condition of the casks? Will you go a little more into detail.
A. When I found the extent of the damage I put in my claim to the insurance company.
Q. Have you been in charge of similar shipments of olives before?
A. I have.
Q. What are the containers, these casks, usually made of?

Objected to.

Q. Have you seen any oak casks?
A. Never in my life.
Q. Not since you have been in the business?

A. No.

Q. How would these casks compare in size and weight with the ordinary shipment?

A. Weighing from 1,600 to 1,800 pounds.

Q. Are they the casks that are always used in trans-Atlantic shipments, or do some come in smaller casks?

A. Only in barrels; 50 gallon barrels; but that is for stuffed olives; not green.

[fol. 54] Q. But ordinary green olives are always shipped in similar casks?

A. Yes, in similar casks.

Cross-examined by Mr. Crandall:

Q. Who is this Jose y de Terry?

A. The shipper in Spain.

Q. Do you know him?

A. I do.

Q. How long have you known him?

A. I knew him the last 12 years, myself.

Q. What kind of relations have you had with him?

A. Just as a shipper of olives, an exporter. I have been buying from him right along.

Q. For 12 years?

A. Yes, on and off, of course.

Q. How long have you been in the olive business?

A. Since 1907.

Q. Do you say that in that 15 years you have never seen the olives come in here in oak casks?

A. No, sir.

Q. How about before that? Do you know what kind of casks had come in before that?

A. I do not know.

Q. Do you admit that these were bad casks?

A. When they got here, yes.

Q. Do you admit that the casks themselves were weak?

A. I couldn't tell you, because when I saw them they were all broken up.

Q. Do you admit that there was bad wood in the casks?

A. I would not say that.

Q. Do you admit that the hoops were weak?

A. I can't quite remember that.

[fol. 55] Q. What seemed to be the matter with the casks?

A. Well, all the staves were broken; some of them; not all. I had a shipment of 100 casks. Of course the brine ran out and if brine runs out olives lose their flavor and color and are not fit to eat.

Q. Did you make a close examination of the staves of the casks?

A. Yes.

Q. Did you look to see whether the wood was good or not?

A. Not as far as I can remember.

Q. Was the wood in the staves new or old? Were they new or old casks?

A. They were new casks from the appearance of them; they seemed to be new.

By the Court:

Q. What was the matter with the casks?

A. These casks when they arrived were all leaking and the hoops were slack; naturally the staves got lossened and it flies all off then. Some of them were broken.

Q. Some of what were broken?

A. Some of the casks, staves and hoops.

By Mr. Crandall:

Q. The head has a tendency to come out when the hoop is slack, doesn't it?

A. Absolutely.

Q. Did you say "absolutely"?

A. I am not talking about them; they are just hoops.

Q. But when the hoops towards the end come off doesn't the head [fol. 56] have a tendency to come off too?

A. Even when the first and second hoop come off the head may remain if not rough handled.

Mr. Crandall: I move to strike out the latter part of the answer "if not rough handled."

Motion denied.

Exception.

Q. What hoops must come off before the head will come out?

A. The head hoop.

Q. Do you mean the master hoop?

A. I am not an expert. I don't know what you call the master hoop.

Q. How about the hoops. Were they rusty?

A. They appeared to be rusty, yes.

Q. What was the condition of the hoops on these casks?

A. They appeared to be rusty. You can't have a brand new hoop in a cask when it comes off the seas.

Q. (Repeated.) What was the condition of the hoops on these casks? Did they appear to be rusted?

A. They appeared to be rusted, yes.

Redirect examination by Mr. Woodruff:

Q. Did you see any casks that were not broken?

A. Yes.

Q. What did they look like to you?

A. Pretty good.

Q. Were they as good as the average cask that you get?

A. Oh, yes.

[fol. 57] Q. Have you ever seen any casks of olives in brine where the hoops were not rusty?

A. Never.

CHARLES A. THAYER, being duly sworn and examined as a witness for the libelant, testifies.

By Mr. Woodruff:

Q. What is your occupation?

A. At the present time I am the Department Manager for Austin Nichols & Company. In 1917 I managed their olive importing department.

Q. Do you remember this consignment of the 227 casks of olives to Austin Nichols received by the Steamer Isla de Panay in November, 1917?

A. Yes, very well.

Q. Did you have charge of the receiving of that consignment for Austin Nichols?

A. I did.

Q. I show you these two bills of lading, 3 and 4, and ask you if those are the bills of lading on the shipment to Austin Nichols?

A. Yes, sir, they are.

Q. Does those bills of lading contain any notations as to defective casks or insufficient containers or anything that would call any one's attention to the character or condition of the containers?

Mr. Crandall: My previous objection is renewed, that the bills of lading speak for themselves.

[fol. 58] Objection sustained.

Exception.

Q. Are these bills of lading what you in the course of your business would call a clean bill of lading or not?

Objected to.

Objection overruled.

Exception.

A. They are.

Q. What do you mean by a clean bill of lading?

A. A clean bill of lading is a bill of lading that a banker will accept and attach to a draft and on which he will make payment against a letter of credit, and which indicates that the merchandise was in good condition when it was received from the steamship company.

Q. If the bill of lading contained any notations as to defective containers, old insufficient containers, would it be a clean bill of lading?

Objected to as calling for a conclusion and as immaterial.

Objection sustained.

Exception.

Q. In the course of your business in connection with a consignment of olives have you ever received any bills of lading containing notations of the character that I have mentioned?

[fol. 59] Same objection.
Objection overruled.
Exception.

A. Yes, we have.
Q. Have you received many of them, is it an ordinary thing?
A. No, it is an unusual case.
Q. In case you do receive such a bill of lading with notations what do you do with it?
A. We hold our shippers responsible. They have to stand responsible for the consequences of having shipped goods——

The Court: This is a very strange line of examination.

Q. You received this in the ordinary course of business?
A. Yes.
Q. On the strength of this bill of lading did you accept the shipment?
A. We did.
Q. Did you pay the shipper for the goods?
A. The money was placed in Seville at the time we made our purchase, and it was made available for his drafts in connection with a clean bill of lading.
Q. You paid the money in advance on which he could draw for a clean bill of lading?
A. Yes; in other words a letter of credit was opened.
Q. Under your arrangement would he have been able to draw on a bill of lading which was not clean?
A. He would not.
Q. You didn't examine these goods on the dock, did you?
A. Yes, I examined them on the dock.
[fol. 60] Q. Did you see any of them while they were on board the ship?
A. Yes.
Q. What condition did you find them in? How far were they unloaded when you first went on the ship?
A. I should think about one-third of the quantity was left in the ship when I looked down in the hatchway.
Q. You didn't go into the hold?
A. No, I didn't go into the hold, I stood on the railing.
Q. You looked over the coaming of the hatches down into the hatches?
A. Yes, and I saw a number of broken casks of olives and saw the olives scattered about, and noticed a very strong odor of rotten olives.
Q. They were inside the ship?
A. They were inside the ship.
Q. From your experience will you express an opinion as to a probable cause for the damage you saw?

Objected to as calling for a conclusion and on the ground that counsel has not qualified this man as an expert on stowage.
Objection sustained.
Exception.

Q. Did you examine these goods on the dock?
A. Yes.
Q. What condition did you find?
A. A great many of the casks were without brine. Some of the casks were entirely broken and when tendered to us by the Steamship Company were like bundles of staves and heads. The staves in a [fol. 61] good many of the casks were cracked and broken which allowed the brine to leak off and on that account the olives had deteriorated.
Q. Some of the staves were actually broken?
A. Broken, sappy.
Q. Did you see any of the casks that were not broken?
A. Yes.
Q. In what condition were they?
A. Sound; full of brine, and the contents were satisfactory.
Q. Was there anything about the appearance that indicated that they were unusually old or defective or anything of that kind?
A. No, they were the same sort of packages that had been used right along in importing olives. There was nothing to differentiate them from other importations.
Q. Is this the size, weight and character of cask usually used in exportations from Spain and importations into this country, of olives in bulk?
A. Yes, of plain olives.

Cross-examined by Mr. Crandall:

Q. You say you established a letter of credit on these olives?
A. Yes.
Q. The money was paid in advance?
A. I don't know as you could say that. It was paid after the shipment had been made in exchange for documents.
Q. Who had charge of the paying of the money in Spain? Did you have an agent in Spain?
A. We opened our letter of credit to the correspondent of the Irving National Bank, and they paid it.
[fol. 62] Q. What was his authority in this matter besides that?
A. The letter of credit recites that in exchange for a bill of lading and other documents he shall honor the draft of the holder, in this case Rowlett Pyman & Company.
Q. How long have you been buying olives from them?
A. We have done business with them say for 10 years or more.
Q. Do you claim that these casks were old casks?
A. That will depend on what you mean by old.
Q. Had they been used before?
A. No, apparently not.
Q. This was their first trip?

A. It looked that way to me.
Q. Good casks?
A. Yes, good casks.
Q. So you don't claim that the casks were bad?
A. No, I don't claim that the casks were bad.
Q. How can you tell a new cask from a second hand cask?
A. I consider first the appearance of strength, the appearance of the hoops and the character of the staves. If a stave shows signs of rot then it would be an old cask in my opinion.
Q. Would you say these were new or old?
A. I looked at them and picked up pieces of staves that were hanging about, and to that extent formed my opinion regarding them.

[fol. 63] Redirect examination by Mr. Woodruff:

Q. When you answered that you don't claim these casks were bad you meant to apply that remark to the casks that were not injured, did you not?
A. I might say that our claim is that these casks were handled in a bad way, by bad methods.

Mr. Crandall: I move to strike that out.
Motion granted.

Q. You would not claim that the broken casks were in good condition would you?
A. No, sir.
Q. Do you mean that broken casks were bad casks?
A. No, I was looking at the casks as they came out of the ship and on the dock, and I found them in bad condition. I don't make any claim about the casks; but we are making a claim about the manner in which they were handled.
Q. But you don't claim that the casks were bad containers?
A. The casks were satisfactory containers. They were the same casks that we use right along.

By Mr. Crandall:

Q. Of course the casks that were broken naturally were not satisfactory containers?
A. No.
Q. At the time these drafts were accepted or bills of lading received had you any reason to believe that these olives were otherwise [fol. 64] than sound and well packed and in sufficient containers?

Objected to on the ground that the bills of lading speak for themselves.
Objection overruled.
Exception.

A. I had no reason whatever.

FRED C. RODMAN, being duly sworn and examined as a witness for the libelant, testifies:

Mr. Woodruff: As to the Tolibia claim against the same ship it is stipulated that the bill of lading in this case was the same as those issued in the other two cases.

Mr. Crandall: I will stipulate that the stipulation for value in the other cases will cover this, provided our clients will consent to it. If I can get their consent I will do so.

By Mr. Woodruff:

Q. What is your present occupation?
A. Cargo surveyor.
Q. Employed where?
A. 56 Beaver Street, New York.
[fol. 65] Q. With whom?
A. Under a retainer of the Insurance Company of North America.
Q. Where were you in November, 1917?
A. In the employ of Koehler & Kemp.
Q. Is that Koehler, Kemp & Koehler now?
A. Yes.
Q. Who are they?
A. Cargo surveyors.
Q. And your employment in connection with them was to actually survey cargoes on which claims had been made of damage?
A. Yes.
Q. I ask you to examine these documents and tell me what they are (handing witness papers).
A. They consist of one original report and two copies of my survey report issued in connection with damage to olives on the steamer Isla de Panay.
Q. Do those reports cover the three consignments in suit here, Austin Nichols, E. Sanchez & Co. and E. Tolibia & Company?
A. Yes.
Q. Did you make that report yourself?
A. Yes.
Q. Did you actually survey and inspect the goods yourself?
A. I did.
Q. Did you go on board the ship when she was at pier 8 East River?
A. I did.
Q. What state of unloading had been reached when you first went there?
A. I would have to refer to my notes to tell you.
Q. I think you can refer to your notes and refresh your memory.
A. (Referring to notes) The casks were still in stowage in #1 lower hold and all but a few had already been removed from the #4 hold.
Q. Did you go into all the holds of the ship?
A. I went into the #1 lower hold.
[fol. 66] Q. How about #3?
A. #3 I have no record of.

Q. Did you go into #2 or #4?
A. I looked down into #4 and it was practically discharged.
Q. Were the olives and casks still in two tiers in #1 hold when you went down?
A. Yes, they were stowed two high.
Q. What condition did you find them in, in that hold, #1?
A. I found the casks in more or less damaged condition and the fruit in them giving off an objectionable odor of decomposition.
Q. Were the casks intact or were they broken?
A. They were broken.
Q. State the nature of the damage as well as you can?
A. In breaking out the crates of lemons and onions and chestnuts, there were eight packages to a sling; the stevedore had crushed the casks in the square of the hatches by dropping the sling loads onto them, and by making the sling loads too large men knocked most of the hoops loose in the casks in the square of the hatch.
Q. So the casks had the appearance of being crushed in the hold?
A. During discharge, yes.
Q. During discharge of other cargo?
A. Yes.
Q. Weren't they crushed on the upper part of the bilges?
A. Yes.
Q. Where slings had been deposited on them or dragged over them?
A. Yes.
Q. Did you see any casks in the hold broken to pieces?
A. Not completely broken up.
Q. Were any olives scattered around in the hold?
A. They were in the #4 hold.
[fol. 67] Q. How did you see that?
A. In looking down the hatches I saw the loose fruit scattered in the bottom of the ship.
Q. In any considerable quantity?
A. No.
Q. But here and there olives were scattered round?
A. Yes.
Q. Was there a smell of brine in the various holds?
A. No. I would not attribute the smell to brine; I would attribute the smell to decomposing olives.
Q. Olives will decompose if robbed of the brine, will they not?
A. Exposed to the air, yes.

Mr. Woodruff: I offer in evidence these reports.

By the Court:

Q. You were telling about things that stevedores have done. You didn't see them doing anything, did you?
A. Yes, sir.
Q. You saw them doing this?
A. I saw them doing it, yes, sir.
Q. Tell me again what you saw them do.

A. The after part of the #1 hatch immediately above the olives was stowed with crates of lemons and crates of onions and crates of chestnuts. These were taken out about 8 packages to a sling, each sling load was dragged from the after part of the hatch over to the square of the hatch, and the gradual loosening of the hoops on the casks when the sling load was set down heavily resulted in crushing or depressing the bilges and sides.

[fol. 68] Q. They were dragged from the after to the forward part of the hatch?

A. They were dragged from the after part out to the square of the hatch.

Q. And that loosened the hoops?

A. Yes, sir.

Q. So from your observation there was no trouble with these articles when the stevedores' operations began, when the discharging of the cargo began there was no trouble with the barrels. Is that your observation?

A. Yes, that would include an examination of all the casks which were still in the original stowage.

Q. So there was no trouble with the casks or barrels when you first saw them?

A. When I first saw them they were then discharging the cargo.

By Mr. Woodruff:

Q. Were any of them broken when you first saw them?

A. Yes.

Q. They were in process of being broken?

A. They had already been broken and were in process of continuing to be broken.

Mr. Woodruff: I offer in evidence the survey reports.

Mr. Crandall: I object to the survey reports as not competent They are self serving declarations.

The Court: Objection overruled. They are the memoranda that the man took at the time.

Exception.

[fol. 69] They are marked respectively exhibits 1, 2 and 3.

Q. How do you account for the decomposing of the olives at the time of discharging?

A. By the fact that the packages, the containers having become damaged the brine escaped and air entered the olives.

Q. How long before did that happen, do you think? On the voyage or during the discharge?

A. Possibly during the voyage and during the process of discharge.

The Court: You don't know anything about it, do you?

The Witness: I would know just this: having examined olives over a great many years I had the definite impression as to their condition, and possibly they may have been without brine.

Q. Does it take some time for the decomposing to progress as far as it had progressed after the discharge?

A. The olives will turn color in a very short while after the brine has escaped and will decompose very shortly after that; possibly within a day.

Q. Then it is impossible for you to state whether this decomposing had set in on the voyage or only during discharge?

A. It would be impossible to state definitely.

Q. Did you make this examination alone or was anyone with you?

A. The examination of the #1 hatch I had Mr. Collins, one of the coopers of Austin Nichols with me.

[fol. 70] Q. I have a witness here Mr. Collins Chivers (indicating). Is that the man you mean?

A. I have always know him as Mr. Collins, yes, sir.

Q. He was with you in the examination of #1 hold?

A. Yes.

Q. Was he with you on the dock?

A. I believe he was on the deck and I went down in the hold.

Q. Did you see any of the casks being actually hoisted out of the hold on to the dock?

A. No, sir.

Q. Did you examine any casks or all of them on the dock after they were discharged?

A. Generally, on the first examination.

Q. These survey reports which you have made are the result of your actual survey and the reports are true, are they not?

A. Yes, sir.

Q. Was there any evidence that the cargo had shifted during the voyage?

A. I can answer that best by saying that there were probably only two or three packages left in #4 hold and I examined them as they were in the original stowage in #1 hold which showed no evidence in the #1 hold of a shifting of cargo.

Q. Were any of the casks in the hold in any such condition as to make it physically impossible in your opinion to hoist them intact from the hold to the dock?

A. There were quite a number which accounted for the loose olives in the bottom of the ship.

Q. It would be really physically impossible to land the casks without their actually falng apart?

A. Falling apart sufficiently to lose part of the contents.

[fol. 71] Cross-examined by Mr. Crandall:

Q. What cargo interests did you represent on your survey?

A. The cargo consigned to Austin Nichols and E. Sanchez, and later on for E. Tolibia.

Q. How long have you been a cargo surveyor?

A. Since 1911.

Q. What day did you go down on the boat?

A. November 27th.

Q. Where was she lying?

A. At pier 8, East River, the south side of the pier if I remember rightly.

Q. Do you remember how many between decks she had?

A. One or two. I didn't go into the construction of the ship.

Q. Where did you go when you went on the ship?

A. I looked in the hatches generally and noticed a few of the packages in the #4 and what packages were still in stowage in #1.

Q. Where did you go? Did you stay on the upper deck or did you climb on the ladder and go down into the hold?

A. I went over into the lower hold.

Q. You went over two between decks?

A. If there were two between decks.

Q. How did you get into the lower hold?

A. On the ladder in the square of the hatch.

Q. What are the dimensions of that hatchway?

A. I took no measurements of the ship or no note of the ship's construction, so that any dimensions or any answer I might make as to the construction of the ship would be purely based on memory or impression.

[fol. 72] Q. How many casks were lying in the square of the #1 hatchway?

A. I will have to refer to my notes to tell you.

Q. Well, tell me.

A. (Referring to notes.) As I roughly remember there were probably six across and four running fore and aft. There were about 24 on top.

Q. How long were you down in the #1 lower hold?

A. Just long enough to watch them sling out the cargo and notice generally the crushed stowage and loosened hoops on the casks.

Q. How many sling loads of cargo did you watch them take out?

A. Maybe six or seven.

Q. What kind of cargo were they taking out with the slings?

A. They were taking out cargo in crates that they sling on a little platform, about 8 crates to a package.

Q. What kind of a little platform was that?

A. Just two or three flat boards with ropes at each end. You generally call that a platform.

Q. Did they put the crates on the top of the platform?

A. Yes.

Q. Were the boards in the platform nailed together?

A. I presume they were.

Q. And they slung them out with the crates on top, with the platform below the crates?

A. Yes.

Q. Where were they taking these crates from? Aft of the barrels in the hatchway or forward?

A. Aft of the barrels.

Q. How did they get those crates from the wings of the ship out to the hatchway?

[fol. 73] A. The packages I saw were not stowed in the wings but were probably stowed aft.

Q. And they were bringing them directly forward and out into the square of the hatch?

A. Yes.

Q. How big were those crates? How big a package did they make?

A. 1½ by 1½ by 3, at a guess.

Q. Does that mean 3 feet long?

A. 3 feet long and 1½ by 1½.

Q. How much did they weigh?

A. I don't know.

Q. Approximately?

A. They might weigh 50 and 75 pounds per package.

Q. How much did these casks of olives weigh apiece?

A. I never had occasion to weigh them, but I should say they run about 1,500 to 1,700 pounds each.

Q. What was over the casks of olives in the #1 hold in the square of the hatch?

A. When I examined them nothing was over.

Q. No skids?

A. No.

Q. How wide were the casks of olives?

A. Maybe 3 feet wide at the widest point I should think.

Q. So in bringing those packages of lemons out how many casks would they touch if there were no skids under them?

A. They might——

Q. No; how many would they touch? How many casks would they bring them over from directly aft to the square of the hatch?

A. 3 or 4.

Q. How long did they allow them to remain on top of the casks?

A. Until the winchman or someone on deck got a signal to take them up.

[fol. 74] Q. What hoops did they scrape?

A. Generally the bilge or quarter bilge hoop.

Q. Those casks have a curve, have they not? They curve up from the ends towards the bilge?

A. Right.

Q. They were stowed fore and aft in the hold, weren't they?

A. Yes.

Q. The crates were drawn forward over the casks, were they?

A. Yes.

Q. Then how, if the crates were drawn forward over the casks and the casks are higher at the bilge, how can it possibly affect the hoops enough to loosen them. I should think they would do just the opposite, move them toward the bilge?

A. Your sling load will only drag on it from over head, will follow the contour of the barrel, and they will go up and down to the bilge again until the bilge of the succeeding casks will catch

it and force it up again. That means that your other sling will drag on the quarter bilge.

Q. Do you think that a package of 50 or 75 pounds was strong enough to bring any weight on the casks?

A. The cases are 50 and 75 pounds for one package. There were 8 to a sling load, so that would be six or seven hundred pounds, if not more.

Q. You were 8 to one sling load?

A. Yes.

Q. Do you know anything about the casks?

A. Sufficiently to determine fairly whether they are sufficient containers or not.

Q. You know a good cask from a bad cask, don't you?

A. Yes.

[fol. 75] Q. Isn't it a fact that a good cask of olives would stand a weight of 400 pounds on top of it for a small interval of time?

A. The question of 400 pounds is taking us into a calculation, and it would be a question of how heavy the impact was.

Q. There couldn't be much of a direct impact if they were drawn out of the after hold?

A. You must remember that the weight of the sling load which we will say was 700 pounds will hit only one of two staves not 1,600 pounds of staves. So that the weight might be only 20 or 25 pounds, so there could not be any direct impact. That was only one of the conditions. That accounted for the gradual loosening of the hoops, but the crushing of the bilge staves was the result of the sudden drop of the sling load on it.

Q. Do you remember that one of these slings dropped down after they were hoisting it up?

A. They were not dropped down, but they were set down suddenly.

Q. They were not dropped down?

A. No, they were not dropped down.

Q. How many slings were there set down heavily?

A. I saw evidence of 5 or 6.

Q. No; how many did you see that dropped or dropped heavily?

A. I will look at my notes again and will tell you a little more definitely (refers to notes); oh, two or three.

Q. What was the effect of the dropping or the laying of this sling on this cask?

A. The gradual and continued depressing of the staves.

[fol. 76] Q. How long did it lay on them?

A. It might only rest on them a second, but the impact would succeed in forcing the staves each time.

Q. Then your statement is not the result of observation of the sling, but it is a conclusion?

A. It was a conclusion possibly, but also seeing that the staves were further depressed during the discharge or while I was there.

Q. Outside of your seeing this sling load rest on the staves for a fractional part of a second your evidence is a conclusion, is it not?

A. Outside of seeing the actual impact?

Q. Yes, outside of seeing this actual impact, for a fraction of a second your statement as to the depression of the staves is a conclusion?

A. It is a conclusion based upon the location of the casks.

Redirect-examination by Mr. Woodruff:

Q. You didn't testify anything about any fraction of a second of an impact?

Mr. Crandall: Objected to, that he saw this sling on there for a fraction of a second.

Objection overruled.

Exception.

A. I meant the fraction of a second in getting it too close. That might be two seconds or a fraction of a minute.

[fol. 77] Q. Did you see more than one impact?

A. I saw several; I didn't tally them.

Q. You saw them hauling these slings, weighing five or six or seven hundred pounds, consisting of a platform suspended by these ropes containing 8 or so cases; every sling was dragged from aft on top of these casks and dropped down before being hoisted?

Mr. Crandall: Objected to; he didn't say there was any dropping down of the sling; he said they let them go down on the cask.

Q. Is my statement correct?

A. At first they dragged them, and then they would sometimes start them a bit and set them down suddenly, and then start them up again and take them out of the ship entirely.

Q. Did you see any casks being crushed by this impact?

A. I remember a few.

By the Court:

Q. Impact of what?

A. The sling load of cargo would come down suddenly on the casks in the square of the hatch before they were finally hoisted out.

Q. What would the sling be full of? Would it be just the sling itself?

A. No, the sling containing the eight packages of lemons or onions or chestnuts.

[fol. 78] By Mr. Woodruff:

Q. How much would it weigh?

A. I should say 75 pounds; only one unit would weigh about that, and there were about eight units to a sling load.

Mr. Crandall: That would only make between four and six hundred pounds.

Q. What would the sling weigh?

A. The sling itself would not probably weigh more than 50 pounds.

Q. Have you ever seen other shipments of olives?

A. Yes, a great many.

Q. Were these in the usual casks that would come from Spain for hold olives?

A. Yes, sir.

Q. How did their condition compare with the average condition of casks?

A. Their landed condition?

Q. No, their condition as you saw them in the hold. I mean the run of the casks?

A. The casks that came out sound in the normal packages?

Q. The usual package in the usual condition?

A. Yes, the usual package in the usual condition.

Q. What wood were these casks made of, do you remember?

A. I would call them chestnut.

Q. Are most of the casks made of chestnut nowadays?

A. As I remember every olive cask has been made of chestnut wood.

[fol. 79] Q. Is any oak used for olive casks now?

A. I have never seen an oak cask.

Q. You have seen many casks of olives of this sort and general character?

A. Yes.

Recross-examination by Mr. Crandall:

Q. There are no hoops on the bilges of these casks, are there?

A. There were two hoops which are run to the center which are called bilge hoops out on the quarter.

Q. How many tiers of casks were in the square of the hatch when you went down?

A. Two tiers.

Q. Where did you stand when you went down there?

A. I probably stood either on the casks or immediately under the deck to keep away from the handling of them.

Q. How much space was there for you to stand in?

A. I don't know; I may have stood in the between decks. I don't remember just what part of the ship I stood, but I remember being in close enough proximity to the casks to know what was happening.

Q. Did you actually see the bilge depressed after the setting down of one of these slings?

A. Yes.

Q. How many times?

A. Several times; I didn't tally the impacts.

Q. What would that have to do with the hoops?

A. The dragging of the sling loads would first loosen your hoops; resting your sling loads suddenly on the bilge would depress the staves.

Q. Isn't that your conclusion?
A. No, sir.
[fol. 80] Q. Did you see it?
A. I first saw the general condition of loose hoops on the casks in the square of the hatch, and on succeeding sling loads. When I saw that I saw the further loosening of the hoops which had already started.

Objected to, that they had already started.
Objection overruled.
Exception.

Q. The hoops on a great many of the casks were loose throughout the stowage?
A. I would not say a great many, because the condition when I saw them applied to the top tiers.
Q. Well, I mean in the top tiers?
A. Yes.
Q. A great many were loose?
A. Yes.

COLLIN CHIVERS, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Woodruff:

Q. What is your occupation?
A. Cooper.
Q. Where are you employed?
A. With the Orient Importing Company.
Q. What is their business?
A. The olive business.
Q. They are importers of olives?
A. They are importers of olives.
[fol. 81] Q. How long have you been with them?
A. Since February of the present year.
Q. Where were you employed before that?
A. Before that I was assistant foreman on the White Star Line.
Q. For how many years have you been assistant foreman of the White Star Line?
A. From October, 1918 until February of this present year.
Q. What was the nature of your duties?
A. Well, it was to see that the goods went on the ship in good condition.
Q. You are a cooper?
A. Yes.
Q. And you were engaged in coopering for the White Star Line and are now for the Orient Importing Line?
A. Yes.
Q. Where were you employed in November, 1917?
A. With Austin Nichols.

Q. In the capacity of cooper?
A. In the capacity of cooper, yes, coopering olives.
Q. Did you examine this shipment of 227 casks of olives on pier 8 East River arriving on this steamer?
A. Yes.
Q. Are you the gentleman who is referred to by the preceding witness as Mr. Collins?
A. Yes.
Q. And you are generally known as Mr. Collins, are you not?
A. Yes.
Q. You examined the olives in his company?
A. Yes.
Q. Did you go aboard the ship?
A. On one occasion I went on board the ship.
Q. Did you go into the hold?
A. No, sir, just on the deck.
[fol. 82] Q. Did you look down into the hold?
A. Oh, yes.
Q. What did you see when you looked down?
A. Well, I couldn't just mention the holds; I didn't take any notice—that is, the numbers of the hatches.
Q. You mean which hold it was?
A. Yes, sir, but what I noticed was that the casks generally were in a bad condition.
Q. In what way?
A. Some of the casks were broken.
Q. How were they broken? In what way? What was the nature of the break?
A. There were broken staves and so on, broken chimes.
Q. Were they crushed as you saw them?
A. Some of them were somewhat flat on top.
Q. Have you in the course of your experience as cooper made many examinations of consignments of olives?
A. Oh, yes, yes.
Q. From your experience to what should you attribute the damage that you noticed in the hold?

Objected to as calling for a conclusion.
Objection sustained.
Exception.

Q. Did you see any of these casks while they were being damaged?
A. Did I see any of the casks while they were being damaged? No, sir.
Q. You did not?
A. No, sir.
Q. How long had you been in the employ of Austin Nichols?
A. 14 years.
[fol. 83] Q. Were you engaged as cooper all that time?
A. Cooper and olive man. I was looked upon by those who knew me as an expert in olives.

Q. What was the condition of the olives in this consignment?

A. Well, the olives, generally speaking—the damaged ones were in very poor condition.

Q. In what way?

A. The olives were dry, twisted, and some of them in my judgment were worth practically nothing.

Q. Were they decomposed?

A. Yes, sir.

Q. Had the brine leaked out of the casks?

A. In some cases, yes.

Q. The olives were dry?

A. Yes, the olives were dry.

Q. In the casks?

A. Yes.

Q. Were any of the casks actually broken so that olives were scattered around?

A. Well, there were some olives scattered around and I know of one instance where there was one cast broken; but I didn't see it in the hold. I knew it was rebuilt down in the hatch of the ship by one of the dock coopers, or two of them.

Q. You mean the broken cask was actually reconstructed and rebuilt in the hold of the ship?

A. Yes, that is what I mean.

Q. Was it then filled with olives?

A. Well, naturally when a cask falls apart they scatter over everything; whatever they collected of the olives they put them back into the cask.

Q. So that when they brought this rebuilt cask out of the hold there were olives in it?

A. Yes.

[fol. 84] Q. Naturally there was not any brine in it?

A. No.

Q. What was the condition of the casks on the dock? Did you examine them on the dock?

A. Yes, I did. A big number of casks had broken chimes and broken staves or cracked staves and they were in leaky condition.

Q. You say "broken chimes". A chime is the top part of the staves into which the head fits to hold it?

A. Yes, and there is a groove in the chime for the stave to set in.

Q. And the groove in the top over the head and the bulge over it is called the chime?

A. Yes.

Q. And the head could fall right out?

A. Yes.

By the Court:

Q. Did you find broken chimes?

A. Yes; when a chime breaks the groove that we speak of, it leaks out through that particular chime.

By Mr. Woodruff:

Q. You say you have seen many shipments of olives in casks?

A. Yes, I have been at them for years.

Q. Have you ever seen any shipments that were in worse condition than this?

A. Well, I would not say; I might have seen one, I would not just say. I have seen them as bad, but at that particular time I believe that was as bad as I had seen for a good while before that; but I have seen others, I believe, as bad.

[fol. 85] Q. Were these casks of the usual size and weight that is used in the Trans-Atlantic shipments, in your experience?

A. Yes, sir, just the same.

Q. What wood were they made of?

A. Well, I believe those were chestnut.

Q. Is chestnut the usual material used in olive casks?

A. I think previous to the war, I am sure previous to the war they were all oak.

Q. How about since the war?

A. Since the war I believe they had gone back to the oak again.

Q. You think they are oak at the present time?

A. Yes; what I have been handling lately.

Q. Have you handled any chestnut casks since the war?

A. I was out of the olive business for three years; during that time I don't know. There were no olives came in where I was working during that space of time and I couldn't tell just what they were made of. Of course I was in touch on and off with the olive business; that is I took care of olives for several firms through the city during the time I was working for the White Star Line.

Q. Do you mean attending to their recuperation, refitting and reconditioning?

A. Yes, sir.

Q. You say these casks were the regular size?

A. Yes.

Q. And they were about 4 by 4 and weighed sixteen or seventeen hundred pounds?

A. Well, they generally weighed from sixteen hundred to eighteen hundred pounds; in exceptional times they weigh a little more.

[fol. 86] Q. Did you see any casks actually being hoisted off the ship?

A. Do you mean in discharging?

Q. Yes.

A. Well, not that I saw.

Q. I mean did you in this particular shipment see any of them being actually hoisted off?

A. No no, I did not. I didn't see any being hoisted off that I remember.

Q. But you did see them in the hold and on the dock?

A. Yes, I saw them in the hold. Of course when the packages came on the dock I didn't notice the discharging of the ship. My business was to take care of the goods.

Q. From your experience in handling and inspecting these shipments to what possible causes would you attribute the damage to these olives?

Objected to as calling for a conclusion.

The Court: I think that is pretty vague, but he may answer the question though it is just a matter of argument.

Exception.

A. Well, I have seen the barrels being loaded on the ships, and the taking of the barrels off the dock in the draft; sometimes they bang against the side of the ship, doing considerable damage along these lines. Of course a cooper's business is to tally those articles right into the hatch if any of them are damaged—I have seen the chimes being broken by the draft going on up into the ship and bang-[fol. 87] ing against the side of the ship and breaking the chimes. I have seen that done repeatedly and I have had to send men into the hatch to see that they are re-coopered.

Q. How about discharging olives?

A. In discharging olives the same thing can occur.

Mr. Crandall: I move to strike all this out.

Motion granted.

Exception.

Cross-examined by Mr. Crandall:

Q. During the war they brought these olives in in chestnut casks?

A. Yes.

Q. Before that time they brought them in in oak casks?

A. Oak.

Q. Are you a cooper?

A. Yes.

Q. How long have you been a cooper?

A. I have been a cooper for 18 years.

Q. Why did they bring the olives in in chestnut casks during the war?

A. From what I have understood of the oak it was very scarce during the time of the war.

Q. What kind of wood is best to make a cask out of?

A. Oak.

Q. What is the matter with chestnut casks?

A. Well, so far as putting in chestnut generally the wood saps. It gets saturated and it don't hold; it is not as good and water-tight as oak.

Q. Olives are all packed in brine?

A. Yes.

Q. A salty liquid?

A. Yes.

Q. What do the chestnut staves do to the brine?

A. I don't think it does anything; I don't catch just what you [fol. 88] mean. Do you mean does it damage the brine?

Q. No, do they soak up the brine?
A. Naturally, providing the wood is new.
Q. What happens to the staves when they soak up the brine?
A. Well, they get more water-tight. So far as the wood being saturated with the brine would have nothing——
Q. Sup-osing the staves are not new?
A. They are saturated generally with the liquid.
Q. Doesn't it make them brittle?
A. Well, no.
Q. Are chestnut staves as good for such purposes as oak staves are?
A. The oak would be better.
Q. Why are the chestnut staves not the best?
A. Oak is understood by everybody in the business as the principal material that they use in making barrels, casks.
Q. Why is it that the chestnut staves are not as good for olive casks?
A. Well, they don't hold as good; that is, they are not water tight to the same extent as the oak is.
Q. Isn't chestnut a much softer wood than oak?
A. Yes
Q. And much more brittle?
A. Providing it would be dried out.
Q. There is much more chance of damage being sustained to a cask made of chestnut than when they are made of oak?
A. I think the chances would be very slight.
Q. If chestnut wood is not as good for casks as oak why wouldn't they suffer damage?
A. If I were to give you my opinion about why the olives do get [fol. 89] damaged it is through breakages and leaks. Even with chestnut it would not leak to that extent and damage the olives. It is easier to break chestnut than to break oak. Oak is a strong material. You know that, and it would stand more abuse than the chestnut generally speaking. Chestnut would not stand the same abuse as oak would.
Q. Do you recommend chestnut as a better wood for casks, especially these large casks?
A. No, sir, I would not.

Redirect examination by Mr. Woodruff:

Q. Do you mean to say that chestnut is in you opinion an improper wood?

Objected to as cross examination of his own witness.
Objection overruled.
Exception.

Q. You heard Mr. Rodman testify that chestnut was the wood generally used at the present time, that he has not seen any oak for a number of years. Is he mistaken.
A. Well, before the war it was generally oak that was used.

Q. When did you leave Austin Nichols?
A. In 1918, in October, 1918.
Q. That was during the war, was it not?
A. That was during the war.
Q. Then you went with the White Star Line?
A. Yes.
Q. Did you have anything to do with the receipt of consignments of olives in casks while you were with that line?
A. No, sir.
[fol. 90] Q. How long were you with the White Star Line?
A. Three years.
Q. Then you went with the Orient Importing business in 1921?
A. Yes, this present year, 1922.
Q. Up to February, 1922 you have had nothing to do with olives in casks?
A. Excepting doing a little job on the side.
Q. But I mean as a general employment?
A. As a general employment.
Q. Is chestnut as strong a wood as oak?
A. No.
Q. Is a chestnut cask as strong as an oak cask?
A. No, sir.

Mr. Woodruff: Will you agree that a Port Warden's testimony will be substantially the same as that of this witness?
Mr. Crandall: I place no reliance on the Port Warden's testimony, and I cannot stipulate anything.
Mr. Woodruff: Then perhaps before reaching the end of the case I will take his testimony.

Recross examination by Mr. Crandall:

Q. Were any of these hoops on these casks rusted through?
A. Well, they generally do rust from the brine; even when in sound condition they rust.
Q. Were any of these staves that you saw broken, soggy or saturated with brine?
[fol. 91] A. They would all be, naturally; they would be in touch with the brine and would be saturated of course.
Q. These were not good casks, were they, as a matter of fact?

Objected to as calling for a conclusion.
The Court: You had better ask him to describe the condition of the casks.

Q. Will you describe the condition of the casks?
A. Well, there were some of them with the hoops rotten; that is, the iron was in a rotten condition and some of them were broken staves; some of them had broken chimes.
Q. What was the condition of the wood in the staves?
A. Well, they were cracked or broken from being either—from bad usage, to my mind.

Mr. Crandall: I did not ask what your opinion was as to the usage, and I move to strike that out.
Motion granted.

Q. What was the condition of the wood in the staves?
A. Well, in order for a stave to be broken it would have to get bad usage. You understand that.

Mr. Crandall: I move to strike out the answer.
Motion granted.

[fol. 92] Q. What was the condition of the wood in these staves?
A. Do you mean the broken staves?
Q. The broken staves or any of the other staves in these casks. Was it in good condition or bad condition?
A. Well, with the staves that were broken, they were broken. The rest of the cask might have been in good condition.
Q. How about the broken staves? Was that wood in good or bad condition?
A. Of course when it was broken it was in bad condition.

By the Court:

Q. Do you mean rotten?
A. Oh, no; now I see what he means. The wood was absolutely sound, only broken.

By Mr. Crandall:

Q. Do you think these were sufficient containers for olives; made out of chestnut?

Objected to.
Objection overruled.
Exception.

A. They would have held the olives all right if they had been treated right.

Mr. Crandall: I move to strike out the answer.

Q. Just forget this question of treatment, and tell me whether [fol. 93] those casks were or were not sufficient containers for olives, made out of chestnut wood?
A. When they were made, of course they were sufficient to hold the olives. Of course they were.
Q. How could they be sufficient if the staves got loose?
A. Well, they couldn't get loose without bad handling.

Mr. Crandall: I move to strike out the latter part of the answer.
Motion denied.
Exception.

Recess till 2.10 P. M.

Met pursuant to adjournment at 2.10 P. M.
Present as before.

Mr. Woodruff: I have no other witnesses present. I cannot l cate the Port Warden, but his testimony would be only cumulative except for the bills of lading and reserving the right to put in certain part of the depositions, that will be our case.

The Court: Do you wish to offer those depositions?

Mr. Crandall: I am going to offer the depositions.

Mr. Woodruff: Then I will not offer them. The Port Warde [fol. 94] says he was there in the employ of the Steamship Compan and examined the casks in the hold, but I do not think he went int the hold.

Mr. Crandall: The Port Warden is supposed to give a certificat for good stowage.

Mr. Woodruff: Perhaps I may be permitted to call him in re buttal.

Mr. Crandall: I offer in evidence the deposition of Captain Artur Musera, Jose Ma Miquel, Miguel Corvera, Emilo Bardecci, Antoni Oliveros; also the depositions taken in Seville, Spain, with the ex hibits attached thereto.

TESTIMONY FOR THE CLAIMANT

ANTONIO RICHICHI, being duly sworn and examined as a witnes for the claimant, testifies:

By Mr. Crandall:

Q. What is your business.
A. Stevedore foreman and longshoreman.
Q. Are you in business for yourself?
A. No, sir.
Q. For whom are you working?
A. At the present time I don't work for nobody. My firm is ou of business.
[fol. 95] Q. How long have you been a stevedore?
A. About twelve years.
Q. Who were you working for in November, 1917?
A. Dominic Pace, stevedore.
Q. Was that in November, 1917?
A. Yes.
Q. Did you have anything to do with the unloading of the Steam ship Isla de Panay belonging to the Spanish Line in Novembe 1917 in New York?
A. Yes.
Q. What were you doing on that steamer?
A. I was attending two hatches, #1 and #2.
Q. What did you have to do with those hatches?
A. To tell the men how to get the cargo out.

Q. Where were you standing when the cargo was being unloaded?
A. I was going down from one hatch to another.
Q. Were you in the lower hold?
A. I was in the lower hold, yes, sir.
Q. Were you at all in the between-decks?
A. Yes.
Q. Were you in the upper and lower between-decks, both?
A. Yes.
Q. Were you there on the dock when these casks were being unloaded?
A. Yes.
Q. Alongside of the ship and on the dock?
A. Yes.
Q. Do you remember these shipments of olives on this steamer?
A. Yes.
Q. What kind of containers were they in?
A. They were in casks.
Q. Were they big or little casks?
A. They were about 5 feet 9 in length, and about 12 feet round.
[fol. 96] Q. Were they five feet 9 inches long?
A. Something like that.
Q. How wide were they from one bilge to the other?
A. About 4 feet.
Q. Did you look at these casks when you were unloading them from the steamer?
A. Certainly.
Q. Tell me what you observed as to the condition of these casks; that is, the wooden staves and the heads and the hoops, et cetera.
A. Well I could see that to sling them up we had to roll them into the square of the hatch because they won't stand by dragging out with the fall, because they were pretty weak and rotten. As soon as you would touch them they would be open, those hoops. We rolled some of them you know. By rolling them in the square of the hatch the hoops would get loose and bursted and some had to be opened in the hold of the ship too, so that we could sling them up as we usually would sling them, we would get them on the dock and roll them into place; and while rolling them some of them couldn't stand it and they would be wide open.

By the Court:

Q. Do you mean the barrels, the casks?
A. Yes, and while rolling the hoops bursted and the heads fell down and the whole business would go down.
Q. Before you began to discharge, when you first saw these casks in the hold, what condition were they in then, before you began to
[fol. 97] roll them?
A. They looked good stowed, but on handling them it was dangerous, because they were rotten.

By Mr. Crandall:

Q. What hoops came off from the casks when you started to roll or handle them?

A. Well, sometimes we would get two hoops in these chimes, and sometimes the middle ones on the bilge.

Q. Was there any other way to get these casks away from the wings of the ship to the square of the hatch, into the square of the hatch, besides rolling them?

A. No, sir, any other way would be worse.

Q. How did you roll those casks over to the square of the hatchway?

A. We had a skid and would roll them on the skid, so we could sling them in the square of the hatch.

Q. What kind of a skid did you use?

A. We had a cable on each edge; there were about two—one about 4 feet long and the other about 16 feet.

Q. Where did you lay these skids?

A. We would shift them; every time we had to get a cask we would shift them because they would not be all in one place; we would shift them so that when we rolled them they would be in the square of the hatch.

Q. Did you place the skids underneath the casks and roll the casks on the skids?

A. Yes.

Q. How thick were the skids?

A. The skids were about 4 inches thick.

[fol. 98] Q. How wide?

A. About 6 or 7 feet wide; about 6 feet wide.

Q. Do you mean one piece of board or several pieces of board nailed together?

A. No; several pieces of board nailed together.

By the Court:

Q. What you did was to place these in some part of the hold, these skids, and roll the casks on top of them?

A. Yes.

By Mr. Crandall:

Q. Had any of the casks that were in the hold broken out of the stowage?

A. No, sir.

Q. How did you get the casks out of the hold?

A. Put a rope sling around the two ends and we hove them up.

Q. How many casks would you take in a sling?

A. One at a time.

Q. Did you use any hooks or clamps in getting these casks out?

A. No.

Q. How did you get the casks away from the side of the ship?

A. The ones that looked good and strong, we would roll them; the others we would land them on the truck and would truck them

so that they would be fixed and then put them where they would belong.

Q. How would you put these casks on the truck? On end or on the bilges?

A. The only way to put them is put them on the head.

Q. Where the heads were out would you or would you not put in new heads before the casks were taken off and put on the dock?

[fol. 99] A. Yes, sir.

Q. Who did that?

A. The cooper.

Q. How did you get casks off from the trucks?

A. We would lay a skid down on the floor and then we had a bag full of corks so that we would not drop the casks.

Q. Did you hear Mr. Rodman, the surveyor, testify here this morning?

A. I heard him but I couldn't catch every word very well.

Q. Did you hear what he said?

A. Yes.

Q. Did you see him on board this ship?

A. No, sir.

Q. Were you down in the #1 hold?

A. I was down in the #1 and #2; in the holds and on the deck of the ship and on the dock, wherever I was needed.

Q. Did you hear him testify that the men would raise these slings and drop them down on the barrels in the square of the hatch?

A. I heard him say that.

Q. Is that true or is it not true?

A. No, sir, it ain't true.

Q. What kind of merchandise did you have stowed in the #1 hold aft of the casks?

A. There were some barrels of wine and some chestnuts and other stuff.

Q. How did you get that stuff from the other part of the hold over these barrels and into the square of the hatch?

A. Well, like the chestnuts we had to sling them on a platform sling, and that would be slung in the square of the hatch, because we could never drag a platform sling from underneath the hatch.

[fol. 100] Q. Where would you leave that platform? In the square of the hatch?

A. Yes.

Q. How would you get the cases on the platform?

A. Pass them from where they are stowed to the platform.

Q. You would pass them from hand to hand?

A. Yes.

Q. By men?

A. Yes.

Q. Did you drag any cases across the barrels in the square of the hatch?

A. No, sir.

Q. Did you have anything over the barrels in the square of the hatch, any skids or anything?

A. If there was a case there so that we had to drag the stuff on top of it, we always took a skid, but there was no dragging on top of the casks at all.

Q. Did your method of unloading these casks of olives differ in any way from the usual and customary way of unloading olives from other steamers?

Objected to.

—. How long have you been unloading olives at the port of New York?

A. At that time I had worked about two years.

Q. For what companies did you work?

A. The same company.

Q. How many different steamship lines did you unload for?

A. Just that single line.

Q. What line?

A. The Spanish Line.

Q. Did you ever see olives unloaded any differently from the ones you unloaded in this case?

A. I saw it, but I didn't work with that.

[fol. 101] Q. Do you understand the question?

A. Yes.

Q. Did you ever see them unloaded any differently?

A. Oh no, no sir.

Q. Did you notice whether the bilges of these casks touched the floor of the hold, or whether they were off from the floor of the hold of the vessel?

A. They were off.

Q. How were the bungs? Were they up or down?

A. They were right on top.

Q. Were there any empty spaces in the hold around these casks when the vessel arrived?

A. No, sir.

Cross-examined by Mr. Woodruff:

Q. Did you say there were empty casks in the ship when the ship arrived?

A. Empty casks?

Q. Yes.

A. No, sir.

Q. Do you ever drag any cargo over other cargo when you are unloading it, cargo from the wings or away from the square of the hatch?

A. If it is like bag stuff we will drag it, but other stuff that is liable to dump we never sling it way in. We always take them out of the square.

Q. These cases of chestnuts. You would not drag those over the other cargo?

A. They can't be dragged on account of the sealing on the platform and that platform will be catching some place.

Q. Have you ever seen that done?

A. Well, I don't have to see it, because I know it.

Q. You have seen it done, where they drag these platform slings over other cargo, it does catch once in awhile?

A. Well, yes, I have seen that.

[fol. 102] Q. How much would you say these casks weighed?

A. About three quarters of a ton.

Q. Should you think they were as high as 5 feet 9 inches, around about 6 feet? Are they as tall as I am?

A. No, about 4 feet.

Q. How much did these barrels of wine weigh? How large were they?

A. Well, they were small barrels, like a 20 gallon or 50 gallon barrel.

Q. Would they roll those casks over or would they pass them from hand to hand?

A. They would roll them over the platform.

Q. You say your platform was under the square of the hatch. You had barrels of wine clear away from them. How did you get them from the platform?

A. There were no casks in where the wing was, because the wine was in the hold, alongside of them.

Q. You had to lift the barrels of wine up on to the casks, didn't you?

A. Well, we had them like clear up to the deck, and we let them down there on the skid.

Q. You had your platform in the square of the hatch?

A. Yes.

Q. And over at the side, you had to lift the casks of wine up on the casks of olives to get them over onto this platform, didn't you?

A. Well, I guess we would drag the olives to the bottom before we would get what was in the wing, of the wine.

Q. How about the barrels of wine that were on top of the olives?

A. They were forward of that.

Q. Were there any barrels of wine stowed on the casks of olives?

A. Yes.

[fol. 103] Q. They were not all under the square of the hatch, were they?

A. Well, unless——

Q. Some would be off at the wings or at the side?

A. Yes.

Q. Those that were off at the side you would roll over to get them on the platform?

A. We would not sling them on the platform; we would sling them on the rope.

Q. You would roll them until you got them on the square of the hatch and then hoist them up?

A. Yes.

Q. Are you prepared to say that when you first saw these casks of olives in the hold none of them were broken?

A. None of them were broken, but you could see the shape they were in.

Q. What shape were they in?

A. Why, so that if you would touch them—you would not want to touch them.

Q. Did they look perfectly sound before you would touch them?

A. No, some were leaking down below.

Q. How did they look on top?

A. Rotten.

Q. Were they broken down or crushed in?

A. No.

Q. How could you tell they were rotten?

A. Well, they were damp and rusty.

Q. But they were not broken?

A. No.

Q. There were no signs of any damage on top? Do you remember there were two men that have sworn that there was?

A. No, sir, what was broken was broken while we were working, because you could hardly move one of them without dragging it.

[fol. 104] Q. You said you were afraid to touch them. What made you afraid to touch them?

A. Because they were badly leaking.

Q. Did they show no signs of breakage at all on top?

A. No.

Q. Any hoops off?

A. Not till you touched them, as soon as you would touch them you would get them off.

Q. But the hoops were all on until you touched them?

A. That is right.

Q. You are not prepared to say that Rodman was not in the hold and you did not see him?

A. He may have been there; I can say that I didn't see him.

Q. Did you notice particularly whether the bungs were on top?

A. They were all on top.

Q. You looked at them all?

A. Yes, you could see.

Q. If they had been half a dozen casks with the bungs a little one side, would you have noticed it?

A. Yes, sir.

Q. About how much do these platform slings weigh? You said they were 6 feet wide and 4 inches thick?

A. It ain't solid; the platform ain't solid; it is two boards this way and empty in the middle.

Q. Then it is not all 4 inches thick?

A. No.

Q. You mean there are two pieces of 4 inch board one at each end and then boards across it?

A. No. We have got two boards on each side, one on top of the other, a couple of pieces across.

Q. Then it would rest on the two 4 inch pieces?
A. Yes.
[fol. 105] Q. How much would that weigh? Would it weigh 100 pounds?
A. No, no.
Q. 50?
A. Well, about 50.
Q. What should you say was the weight of one of these slings that contained cases of chestnuts, or whatever you did swing when it was ready to hoist out?
A. Oh, about 400 pounds.
Q. You say you put this platform under the hatch and then would bring the other goods and put them on the sling and then hoist the sling up?
A. Yes.
Q. And then the sling would be lowered down again and you would proceed?
A. Yes.

Redirect examination by Mr. Crandall:

Q. When you rolled wine barrels from the wings of the ship over to the square of the hatch did you roll them over the olive barrels or over skids on top of the olive casks?
A. They couldn't be rolled on top of the olive barrels because they would be going between them and the work would be three times more than what it should be.
Q. How did you get the mover there?
A. We had good solid boards; if there were a couple we used to put boards on top; when there were like a dozen or so we would put the skid.
Q. Was it easier to roll one barrel on a board or skid than over the tops of the olive casks?
A. Yes.
Q. What was the length of one of these olive casks from one end to the other end?
A. It must have been 5 feet or a little over 5 feet.

[fol. 106] ROBERT FORBES, being duly sworn and examined as a witness for the claimant, testified:

By Mr. Crandall:

Q. Do you understand the Spanish language?
A. Yes, sir.
Q. Where were you born?
A. In Spain.
Q. Do you speak Spanish?
A. A little bit.
Q. What do you mean by that?

A. Enough to be understood.
Q. Do you speak Spanish fluently?
A. Yes.
Q. Have you ever acted as interpreter?
A. I have.
Q. Have you ever acted as interpreter for the firm of Bigham, Engler & Jones?
A. Yes, I have.
Q. On numerous occasions?
A. Yes, sir.
Q. I show you three bills of lading which have been introduced in evidence, Claimant's Exhibits 2, 3 and 4, and I also show you three other documents and ask you to state whether or not these bills of lading in English are a correct translation from the Spanish into the English, and whether you checked up the English translation to see if it corresponded with the Spanish original?
A. Yes.
Q. Is that a correct translation?
A. Yes, sir.

Mr. Crandall: I offer in evidence the three translations of the bills of lading.

They are marked respectively Exhibits A, B and C.

[fol. 107] Q. I also refer to a protest filed in this case, Claimant's Exhibit 11, and ask you to state whether or not you made an English translation of that protest?
A. I have.
Q. Is this the document, is this the English transalation of the protest (indicating)?
A. Yes.

Mr. Crandall: I offer it in evidence.
It is marked Exhibit D.

Q. Did you see the guarantees attached to the commission in this case, which appear in Spanish?
A. Yes.
Q. Have you translated those three guarantees?
A. I have.
Q. Are these your translations (indicating)?
A. Yes, sir, they are.

The translations of the guarantees are offered in evidence.
They are marked Exhibits E, F and G.
No cross examination.

FRANK IANNO, being duly sworn and examined as a witness for the claimant, testifies:

By Mr. Crandall:

Q. What is your business?
A. Stevedore foreman.
[fol. 108] Q. Are you in business for yourself?
A. I have been for myself for the last 4 years.
Q. How long have you been a stevedore?
A. Pretty near 12 years.
Q. Did you have anything to do with the unloading of the steamship Isla de Panay in November, 1917?
A. I was the foreman.
Q. Who employed you?
A. Dominic Pace.
Q. What holds did you have charge of?
A. #3 and #4.
Q. Did you unload many olive cargoes before this?
A. Yes.
Q. How often on other boats?
A. Well, about 20 years before that.
Q. Did you unload olives during that time?
A. Some on the Italian Line.
Q. How did you get the casks into the square of the hatch; the ones that were stowed in the wings?
A. We used to use a skid, first we would take them out of the square of the hatch and would land a skid on the square of the hatch, 2 by 10, 13 feet and then we used to roll them on top of the skid. We would swing on a circle and raise up on them when they were in the square of the hatch.
Q. Did you remove any of the cargo from the square of the hatch before you started rolling any from the wings?
A. Yes, we would take it all off and then we would land it on the skid.
Q. Were you down in #1 and #2 holds also?
A. Well, I used to take a look there once in awhile.
Q. Did they have all the cargo out of the square of the hatch in [fol. 109] #1 and #2 before they started rolling the cargo from the side?
A. Yes.
Q. Did you look at the casks down in #3 and #4 holds and also in the other holds?
A. Yes, sir.
Q. What did they look like? Tell me about the hoops and staves and everything.
A. A barrel they used to stow——
Q. How did the barrels look?
A. They looked very bad; the hoops were all rusted.
Q. How bad were the hoops?
A. You couldn't touch them. If you touched them with your finger nail it would burst the hoops.

Q. How were the staves?
A. They were rotten altogether.
Q. How were the heads?
A. The heads were all right, but the hoops would break off and then the head would come out.
Q. When would the hoops break off?
A. As soon as they would break off then the heads would come too.
Q. When would the hoops break?
A. When we used to move them, to roll them on the skid, then they used to break.
Q. When the hoops broke what happened?
A. The hoops would come off and the olives would go all over the hatches, and then we used to head them up and set them on the dock and land them on the truck and take them to the cooper.
Q. The casks that had the head out you would put on the truck?
A. Yes; they were about a foot and a half high.
[fol. 110] Q. How would you get them off from the 4-wheeled truck?
A. We had a kind of skids and we would have a couple of bags of saw dust on the bottom to put them on.
Q. And the other casks that you didn't take away on trucks what would you do with them?
A. We used to land them on the dock and would roll them on the dock to put them in a certain place, and when we used to roll them the hoops would break and the heads would come off and then we would head them up and would leave them there till the cooper would fix them up.
Q. The coopers were on the dock?
A. The coopers were on the dock.
Q. How did you get them out of the hold?
A. With rope slings.
Q. Did you use any hooks to get them out of the hold?
A. No, because we would break them open if we did that. The staves were not strong enough to hold 1600 or 1700 pounds.
Q. Did you ever see any slings of merchandise being thrown down on top of the casks in the square of the #1 hatch?
A. Oh no, sir; that can't be done.
Q. Did you ever drag any of your cargo in packages across the barrels into the square of the hatch?
A. You can't drag anything on top of the barrels; you would break it. We used to handle them one by one; three men on each side and two men on the square of the hatch, and then we would make up the draft on top of the skid in the square of the hatch. We had a 2 by 10, 13; that means 2 inch board and 10 inch wide and 13 feet long.
[fol. 111] Q. When you had these drafts of cases would you have a little platform underneath them?
A. We had a little platform to take out the onions, about 4 or 5 feet long and 3 feet wide and would make a draft up there.
Q. Why did you have a platform?
A. To take out onions.

Q. Could one man handle one of the big casks?
A. Oh, my God, how could they handle it.
Q. How much do they weigh?
A. About 1600 or 1700 pounds.
Q. Can you use a hand truck to take a cask away from the ship?
A. No.
Q. What is the usual way of getting them away from the ship?
A. You have got to have a 4-wheeled truck, or else land them on the dock and roll them.
Q. When you roll any casks that you thought would not stand the rolling?
A. No, when we saw they were not good enough we would land them on the 4-wheeled truck and bring them to the cooper.

Cross-examined by Mr. Woodruff:

Q. All of those casks that you did roll did not stand rolling, did they? They broke?
A. No, they didn't stand rolling; they broke.
Q. If you had put them on the 4-wheeled truck they would not have broken?
A. No, because when we saw their condition we would land them on the 4-wheeled truck.
[fol. 112] Q. But some you didn't land on the 4-wheeled truck and rolled them away and they broke?
A. Yes.
Q. There were quite a number of casks that did break while rolling on the dock?
A. Yes.
Q. You say you unloaded the square of the hatch. Do you mean to say that you got right to the floor of the hold?
A. No, no; one tier. We did take one tier off first and then we landed our skid.
Q. Just so you could get into the hold?
A. Yes.
Q. Then your skid resting in the square of the hatch would raise the cask that was on it?
A. Yes.
Q. You mean to say that if you had casks or cases of onions off in the wings or fore and aft of the square of the hatch that you would bother to put up skids to carry them to the square of the hatch and put them on this platform?
A. We usually keep the skid on the square of the hatch, and at the same time get a couple of planks and lay them tier by tier and we used to drag some; when we had a chance to pass them hand by hand we would pass them hand by hand, three men on each side.
Q. Frequently you would drag them?
A. No, because they would turn them over and we would have to drag them again.
Q. But you could drag these barrels across these skids?

A. Oh, my God, how could I do it? I am not a machine hauling stevedore.

Q. Did you roll them?

A. Yes, but before that we would put a couple of planks.

[fol. 113] Q. You never dragged them?

A. No, sir.

Q. Where would the men stand while rolling them?

A. If a man rolls a barrel he has got to stand on the casks; he can't stand on the end.

Q. You have testified that the hoops were so rusted that they would break if you touched them with a finger nail, that the staves were altogether rotten?

A. Yes.

Q. How did they get those casks inside the ship in that condition?

A. Well, they used to get them into the ship and would put anything on the ship.

Q. They couldn't get the casks out of the ship and you say they would skid all right. How did they get them into the ship and stowed?

A. They used to put a sling on and put them in the ship; but before they travelled from the other side it would be kind of damp in the hold and they would rust from the other side coming to this side.

Q. Do you think they handled them any better on the other side than you do here?

A. Pretty near the same.

Q. Those casks couldn't have been in the condition that you found them when they were laid down?

A. Maybe they were kind of better.

Q. They must have been much better?

A. Well, some wasn't; they were rusted altogether, as far as I could see.

Q. But all of them didn't break?

A. Oh, of course not.

Q. All of the hoops didn't break?

A. All of the hoops didn't break, of course all did not break.

[fol. 114] Q. Was the wood rotten?

A. The wood was rotten; it was rotten before, because I think those barrels had been in this country and then they sent them on the other side and filled them up again.

Q. Then you think they were rotten on the other side?

A. Yes, they would be put on the ship and it would be during war, and that would cost a lot of money——

Q. And if you had been careful in taking them out of the ship they would have been all right?

A. We would take care of them pretty good.

Q. Who employed you?

A. Dominic Pace.

Q. Is he a general stevedore here in New York?

A. Yes.

Q. Did he work for any other line than the Spanish Line?

A. Oh, I think so.
Q. Have you ever worked for any other line?
A. Yes.
Q. Since you have been working with him?
A. When I chucked my job on the Spanish Line then I went in business for myself.
Q. But while you were with Mr. Pace did you work on any other ship than ships of the Spanish Line?
A. All on the Spanish Line.
Q. Do you know that Mr. Pace did any work for any other line than the Spanish Line?
A. Yes, at Pier 25, North River, Ansaldo, the Italian Line.
Q. But you yourself never worked for any other ship than the Spanish ships while you were with him. Did you use any hooks on any of these casks, any of the good ones?
A. No.
Q. Did you try to?
A. No, sir.

[fol. 115] Redirect examination by Mr. Crandall:

Q. Do you remember seeing Mr. Rodman who was here this morning, that surveyor?
A. I don't think——
Q. Did you see him here in Court this morning?
A. Yes, I saw him in Court this morning.
Q. Was he on board that ship?
A. I don't think I saw him on the ship or on the dock.
Q. You never saw him on the ship?
A. Provided he didn't change his face.
Q. Do you have men down in the hold of your boat when you are unloading it?
A. No, nobody is allowed to go in the hold of the ship.
Q. Did you allow anybody down in the ship when you were discharging?
A. No, it is not allowed, and I never allow anybody to go in the hold of the ship, because if anything happens the foreman at the hatch gets the blame for it.

Recross-examination by Mr. Woodruff:

Q. You never let the surveyor for an insurance company go into the hold of the ship?
A. He is not allowed to go. He is only allowed to go by the hatch and look down in the hold.
Q. He can go on the ship?
A. Oh, yes, I can't stop them from doing that, but if he wants to go in the hold I will stop him, or else I will stop the gang altogether.
Q. You don't want a surveyor to see your work. Is that it?
A. Oh, yes, I do; but if anything is broken or anybody got killed I would get all the blame for it.

[fol. 116] Q. You are not prepared to swear that Mr. Rodman didn't go in the hold?

A. I didn't see him at all.

Q. But he might have gone in, might he not, and you not have seen him?

A. I didn't see him no place.

SALVATORE NOTO, being duly sworn and examined as a witness for the Claimant, testifies through the interpreter Connie Mantia, who is also sworn:

By Mr. Crandall:

Q. What is your business?

A. Foreman.

Q. Foreman of what?

A. Stevedores.

Q. Do you work for yourself?

A. No.

Q. Who do you work for?

A. Do you mean now?

Q. Yes.

A. The Prince Line.

Q. How long have you been a stevedore?

A. 13 years.

Q. Do you remember unloading the steamer Isla de Panay in New York in November, 1917?

A. Yes.

Q. Who were you employed by at that time?

A. Dominic Pace.

Q. What did you have to do on the Isla de Panay?

A. I was head foreman.

Q. What hatch did you go down into?

A. All of them.

[fol. 117] Q. Where else did you stand beside being in the hatches?

A. Well, I was standing on the dock and then again upon the hatches.

Q. Do you remember these shipments of casks of olives from Spain on that trip?

A. Yes.

Q. Did you look at those casks when they were in the hold, and when they were on the dock?

A. Yes.

Q. Tell me what you noticed about those casks. A. How did they look?

A. They were very bad.

Q. Tell me all about them. Describe how they looked.

A. The hoops were all in bad condition. Some of them were broken, and the staves of the casks were rotten.

Q. When you say the hoops were in bad condition describe a little more fully what you mean. In what respect were they in bad condition?

A. Well, I mean that the wood was not the same as all the other casks that we had been handling.

Q. I mean the hoops.

A. They were rusty; the hoops were rusty.

Q. Will you tell me what happened to the barrels or casks when you were taking them out of the ship?

A. Do you want to know the manner in which we took them off?

Q. No, what happened to them when you took them off?

A. When we handled them to put them on the skids, so as to roll them down to the hatch, some of the hoops would break, because they were rotten.

Q. How did you get these casks into the square of the hatch?

[fol. 118] A. We used skids to roll them, and we used to roll them right on to the square of the hatch so that we could sling them right off.

Q. How did you sling them out of the ship?

A. With a sling.

Q. Did you use any hooks, or clamps on these casks?

A. No.

Q. When you started to roll these casks in the hold you say the hoops went off, some of them?

A. Yes, every now and then one of the hoops would crack and break right off.

Q. What happened when the hoops would break?

A. When this would happen then we would take the casks and put it on a 4-wheeled truck.

Q. Did any of the heads get out of the casks down in the hold?

A. No.

Q. What casks did you put on the 4-wheeled trucks?

A. When one of those heads would come off——

Q. Did I understand you to say that no heads came out down in the hold?

A. No, they didn't come off.

Q. What casks did you put on the 4-wheeled trucks?

A. Those whose heads would come off.

Q. When did the heads come off?

A. When we would take off the top tier, when we would see the bottom tier some of the heads would be crushed then, the heads of the casks on the bottom tier.

Q. When did the ends of these casks come out?

Mr. Crandall: He doesn't understand you.

[fol. 119] A. The heads never would come off, only the hoops would come off.

Q. When would the hoops come off?

A. One or two; as soon as you would touch them they would come off.

Q. What casks did you put on the 4-wheeled truck?
A. Those casks whose hoops came off, because we were afraid that when the hoops came off by rolling them over to the dock the heads might come off too.
Q. Did you drag any cases of merchandise over the tops of the casks into the square of the hatch?
A. No, we did not.
Q. Did you take any of these slings of boxes and lift them up and then drop them down on top of the casks in the square of the hatch?
A. No.
Q. Do you remember that Mr. Rodman who was here this morning, that surveyor——
A. No.
Q. You saw him in Court this morning, didn't you?
A. Oh yes, I saw him, but I don't know him.
Q. Was he down in the ship when you were discharging that cargo?
A. No.
Q. Did you allow men to go down into the hold when you were discharging your cargo?
A. No.
Q. Did you ever roll wine barrels across the top of the casks of olives?
A. No.
Q. How did you get the wine barrels over to the square of the hatch?
A. We would put some planks and roll the barrels on the planks.
Q. Did you have any lemons on board this ship at that time?
A. No.
[fol. 120] Q. When you took that cargo in cases, and took it out of the vessel and there were any casks in the square of the hatch how would you get this cargo in the cases over to the square of the hatch?
A. We would place a platform in the square of the hatch and the men would pass by hand the cases and place them on the platform.
Q. Is there any way to get those casks away from the wings of the ship over to the square of the hatch except by rolling them?
A. Which ones do you mean?
Q. Casks of olives?
A. No, you would have to roll them.
Q. There would be no other way?
A. No.

Cross-examined by Woodruff:

Q. Did you see any casks broken in the hold?
A. No.
Q. Did you see any hoops broken in the hold?
A. No.
Q. Were any staves or heads broken?
A. No.
Q. When would they first break and begin to spill olives?
A. In handling them from the tiers in the hold some of the hoops would break.

Q. Would the casks break while handling in the hold?
A. No, they would slacken.
Q. Did any olives leak out in the hold?
A. No, the brine would.
Q. The brine would, but no olives?
A. No.
Q. Was that true of the casks in the whole tier of the hold, the [fol. 121] bottom tier, that there were no broken casks?
A. No, not the barrels; hoops.
Q. And no olives leaked out in the hold?
A. No.
Q. What cargo was on the ship besides these casks of olives?
A. Onions, barrels of wine and onions.
Q. Were there any drums of oil, essential oil, metal barrels?
A. No, small casks of wine.

NOEL P. PILCHER, being duly sworn and examined as a witness for the Claimant, testifies:

By Mr. Crandall:

Q. What is your business?
A. Inspector of cargoes, and cargo surveyor.
Q. Do you hold a master's certificate?
A. I hold a British extra master's certificate issued by the British Board of Trade.
Q. Were you ever master of vessels?
A. For 8 years master of steamers trading principally between New York and the Far East.
Q. How long did you go to sea before you were on shore?
A. 25 years.
Q. What companies in New York have you acted as surveyor for?
A. The Cunard Line, the Anchor Line, the Hawaiian American Line, the United American, Hamburg American Lines, Lloyd, Sa- [fol. 122] baudo, Kerr Line, Oriental Line, Garcia & Diaz, Jose Taya's Sons, Booth Line, the Blue Funnel Line, and quite a number of others.
Q. When you were at sea what trades were you engaged in?
A. When I was in sailing ships we were trading principally between Great Britain and India and Australia, in steam trading principally between New York and the Far East, China and Japan.
Q. What kind of barrel cargo, if any, have you carried?
A. Barrels of oil from New York, petroleum, lubricating oils and inward would be bean oil, cocoanut oil in hogs-heads and pipes, wood oil, essential oils.
Q. What experience, if any, have you had with olives from the Mediterranean to this port?
A. I have inspected a number of cargoes containing olives in brine from Spain; I say a number, probably several hundred during the past years, both on the Anchor Line steamships, and Garcia & Diaz ships.

Q. Where did you inspect it from?

A. In the port of New York at various piers; I saw them in the vessel in stow during discharge and on the pier whilst waiting delivery.

Q. I want to put a hypothetical question to you. I want you to assume the following facts as true: Assume that the steamer Isla de Panay was a vessel of 3484 gross and 2087 net tons. That she had a lower hold and upper and lower tween decks. That she had four holds or compartments, No. 1—59 ft. in length and 39 ft. in width. No. 2—62 ft. in length and 41 ft. in width, No. 3—44 ft. in length [fol. 123] with 8 ft. of allowance for fan or tunnel recess and 40 ft. in width, No. 4—72 ft. in length with 26 ft. of allowance for the fan or tunnel recess and 39 ft. in width.

That the distance from the floor of the hold to the tween decks was 13 ft. That the distance from the top of the fan to the lower tween decks was 5 ft. That the bilges of the vessel were cleaned out and whitewashed before any cargo was loaded.

That most of the casks of olives which are referred to in these actions were stowed in lower holds Nos. 1, 2, 3 and 4. That the casks measured approximately 5 ft. in length and 4 ft. in diameter at the bilge and each weighed approximately 750 kilos.

That cargo battens were laid around the sides of the ship on her beams. That in holds Nos. 1 and 2 dunnage wood was placed between the casks and stanchions; that the casks of olives in holds Nos. 1 and 2 extended across the ship from one side to the other and that in holds Nos. 3 and 4 they were stowed on either side of the shaft tunnel which had a wooden covering; that all casks were stowed with their bungs up and their bilges free; that no cargo was stowed below the casks in the lower hold; that there was a clearance of between 1 and 2 inches between the bilges of the casks in the first tier in the four holds and the floor, which clearance was obtained by placing wedges or quoins 4 or 5 feet long and 4 or 5 inches wide at the ends of the casks; that at the end of each cask on each side a small quoin was placed; that in holds 3 and 4 dunnage wood was put between [fol. 124] the casks and the shaft tunnel; that after the first tier of casks in the lower holds was laid a second tier was stowed on top of the first tier one on four or bilge and cuntline with wedges between the casks; that between the casks nearest to the skin of the ship small cargo was stowed if there was any room, or if there was not sufficient room for cargo dunnage wood was laid; that there were no empty spaces around the casks of olives in the lower holds; that on top of the second tier of olives small barels of wine, cases of wine and cases of chestnuts were stowed; that all empty spaces around the olive casks in the four holds were completely filled with other cargo or dunnage wood; that the wine barrels were about ¼ to 1/6 of the size of the olive casks; that the casks of olives occupied a height in the hold of approximately 9 ft.; that in the space on top of the fan or tunnel recess, at the after end of the No. 4 hold, 1 tier of olives in casks was stowed, being qoined and chocked in the manner previously stated; that some bags of chestnuts were stowed on top of the olives on the fan; that the space forward of the olives stowed on the

fan was completely filled with cargo; that the tween deck hatches were covered and that in the square of the hatchways Nos. 1, 2 and 3 in the upper tween decks, one tier of olive casks were stowed; that the casks in the said tween deck hatchways were quoined and dunnaged in the same manner as those in the lower holds; that above the cases of olives in the tween deck hatchways bags and cases of chest-[fol. 125] nuts were stowed, and that the space at the sides of the casks of olives was filled with chestnuts and that there were no empty spaces either forward or aft of the olives in the tween deck hatchways. That all casks, whether in the lower holds, on the tunnel recess or fan in hold No. 4, or in the square of the Nos. 1, 2 and 3 hatchways, were stowed bung up and bilge free.

Q. What is your opinion as to whether or not the stowage of the casks of olives as I have stated to you was the usual and customary method of stowing olives in the transatlantic trade, and whether or not such stowage was proper?

Mr. Woodruff: Objected to as being incompetent and irrelevant, being somewhat outside of the case. There is no custom as to the stowage pleaded in this case, and there has been no issue raised by the testimony of the libellant as to the actual disposition of these casks in the hold of the ship.

The Court: What is the claim of stowage?

Mr. Woodruff: That the casks were damaged while in the care and custody and on being delivered by the ship.

Mr. Crandall: I am prepared to show proper stowage.

The Court: He may answer the question.

Mr. Woodruff excepts.

A. Such stowage as you describe was customary and proper.

[fol. 126] Q. Assuming that these casks were 4 feet in diameter, what can you say as to the possibility of any undue pressure being placed upon the two tiers in the lower hold?

A. There could not be; if there were only a 4-foot clearance over the uper tier and a part of that space was filled in with onions which is in itself light, there would be no undue pressure on the olives.

Q. Have you any objection to stowing casks on top of a tunnel recess?

A. None whatever.

Q. Have you any objection to stowing casks in the square of the upper between decks hatchways provided the empty spaces around them were filled in?

A. None at all.

Q. Is there any method of discharging or handling casks of olives at this port when they get off from the vessel and are landed alongside, other than rolling them in to their place on the pier?

A. No, when the cask is raised up they are rolled into a position on the pier where they are to await delivery.

Q. Is there any way that you know of getting casks into the square of the hatchway other than rolling them from the wings of the ship to the square of the hatchway?

A. I have always seen them rolled into the hatchway.

Q. What, if anything, can you tell us with regard to the use of chestnut wood for olive casks?

Objected to on the ground that no foundation has been laid for the question.

[fol. 127] Q. Are you familiar with the advantages or disadvantages of oak, chestnut, and other woods for olive casks?

A. Yes.

Q. What experience have you had with regard to observing different kinds of wood for olives?

A. During the past six years in the Port of New York I have examined many thousands of casks, both of oak and chestnut wood and have gone to a considerable amount of trouble in making special surveys and reports to steamship companies concerning the examination. In 1919 the chestnut wood casks were coming in in such condition from Spain and Italy with olives alone that we brought the attention in circular form to different ship owners and showed them as comparison the result of chestnut wood as compared with oak.

Q. Based upon your own observation?

A. Absolutely, on special surveys, under my own observation.

Q. Based upon your own observation of the containers in which olives came in, will you tell us what are the relative merits of oak and chestnut for olive containers?

A. My experience of oak containers has been that the results are good. The containers come here in fair condition and their contents are usually intact. With chestnut wood we invariably have some heavy leakage, whether it is the olive in brine or whether it is oil. The olives in brine, or the brine itself, causes the chestnut wood—which is softer than oak and more brittle—to become soggy. When it gets soggy and saturated the staves crack and [fol. 128] when they are cracked you can see the saturation of the staves right through the staves. Also in carrying olives one must always consider the contents, and that the hoops will rust. When the hoops gets so rusted through the edge of the containers they burst and then the staves open; even though the heads do not come out the leakage of brine takes place; I would say that the chestnut wood containers would not compare with the oak containers for the carrying of oil or brine or any similar commodity.

Q. How long have the chestnut containers been used for olives?

A. From experience I cannot say what was used before the war because I was at sea until 1916; but my experience on the Spanish coast, where I was for six months, showed me that it was the custom in Spain to import oak in staves from this country and from Great Britain to make these containers. Since the war as a result of war conditions, and not being able to get the imported wood, they made them of chestnut. That applies to the olive oil also.

Q. Did you hear the testimony this morning of Mr. Rodman about these slings damaging the casks in the square of the hatch?

A. Yes.

Q. Assuming that that testimony is true what effect would such a sling have upon a cask which was a good strong container for olives?

A. I don't think it would have much effect on the containers unless they were to do it continuously for some period of time; but I would expect to see an effect upon the containers of the onions, if they were onions, because the containers of onions are [fol. 129] brittle wood and the sides or ends would burst.

Q. How large are these ordinarily large casks in which olives are carried?

A. Olive casks?

Q. Yes.

A. They measure about 5 feet in length, 4-feet from bilge to bilge.

Q. How much do they weigh?

A. About three-quarters of a ton.

Cross-examined by Mr. Woodruff:

Q. Do you think no precautions are necessary with good strong oak casks of olives, hitting them with cargo as has been testified would not have any effect? You said no damage would be done by hitting these casks with cargo?

A. If as described by Mr. Rodman where they were not dumped down on them and there would be a pressure brought to bear for a short time, it would not have any material effect upon good sound containers. It would have, if you dropped 8 packages down the hatchway on top of them. It would break them.

Q. Are they using any oak casks now?

A. I couldn't tell you what they are using, because today I leave the ships in the hands of my two assistants. One ship discharging olives in brine at present in Brooklyn, we have, but I have not seen her.

Q. As a matter of fact you have not personally known of any oak casks since they began to manufacture chestnut casks owing to war conditions?

A. That I cannot say; some are oak and some are chestnut I [fol. 130] believe. I have never made an examination to see which is which. In July we had a ship in Brooklyn on which the casks were reported to me as being oak and chestnut, one of the Ybarra Line steamers.

Q. You think they use oak and chestnut indiscriminately now, do you?

A. They use oak and chestnut, both.

Q. Assuming that the casks were of chestnut in the average condition of shipments during the war, would it be likely that any effect of 4-feet of super-stowage of small barrels or casks of wine and cases of chestnuts, considering how they would have to be put into the ship by being rolled or wheeled or carried over the casks to stow them, and having to be carried over the casks to get them

out—would there be any likelihood of their doing damage to these casks of olives.

A. No, sir, not if these casks had come on board intact and had been stowed intact with only 4-feet moving room, with wine or other light commodity such as onions, I think they were perfectly justified in stowing them over the olives.

Q. If it appears from this testimony that these casks when they arrived at Seville were in a leaky condition, some of them were re-coopered and made tight so as to show that there was no leaking while loading these casks onto the river steamer and transporting them down the river and bringing them alongside of the Isla de Panay and stowing them in the hold, and that there was no leakage, would you reasonably expect that they would arrive intact [fol. 131] with that method of stowage?

A. We might expect them to arrive intact under those conditions.

Q. Your answer would be yes or no to that question?

A. One would reasonably expect them to.

Q. That was my question. Your answer would be yes, would it not?

A. Well, I would not know—I would say yes, I say you might expect them, but when you get to your port of destination.

Q. Would they come apart?

A. If they had been re-coopered and came on board in apparent good condition you would expect them to be discharged in good condition.

Q. If they were re-coopered so that they survived all this handling with no leakage apparently, you would reasonably expect them to arrive at their destination in good condition, would you not?

A. What do you mean by "good condition"? I have never yet seen or known of any consignment of olives in brine making her discharge without heavy leakage of brine.

Q. That is, heavy leakage of brine; not of the olives?

A. Heavy leakage of brine.

Q. Except for this heavy leakage of brine you would reasonably expect, or would expect, that the olives under the conditions mentioned in my previous question would arrive in reasonable condition?

A. I would expect the containers to arrive intact.

Q. Assuming that on the voyage there was a great quantity of [fol. 132] leakage so that the brine was pumped out of the bilges. Would that have any effect on the condition of the casks, on their arrival and on the effect of the super-imposed cargo? Would not the super-imposed cargo tend to crush these casks?

A. I don't think there was sufficient cargo on top of them to crush them in a 13-foot hold which is a very, very shallow hold for ocean going vessels.

Q. Not even if the casks had suffered great leakage?

A. If they were good casks they would have stood up; you might have had empty casks and have had the hold under them wet.

Q. As far as the casks that are used at this time in shipping

olives, would you expect them to come through intact if there were an unusua' leakage?

A. I would expect the containers to be intact.

Q. That being the case and they arriving here intact, suppose they are delivered on the dock broken with the hoops off and the staves broken and the olives leaking out on the dock; you would think that something unusual had happened to them, when you bear in mind the handling that they had on the other side, would you not?

A. It would depend on the condition of the containers, if the containers were rotten they would fall to pieces in handling them.

Q. These containers are good enough to stand all the handling on the other side, and if they crossed the ocean being partly empty or not, and still remain intact, and they arrive on the dock partly broken, but with the olives gathered around, your reasonable inference would be that something untoward had happened?

[fol. 133] A. Not if I knew the condition which I have been given to understand, that the hoops were so rusted that they fell apart and the staves were rotten and were broken, I would expect them to fall apart when they were being discharged.

Q. These casks have been able to stand all of this various hauling; they have been hoisted in the hold and lowered in the hold, and stowed on a ship, and there is no leakage?

A. I was given to understand that there was very heavy leakage in the ship.

Q. We are coming to that. There was no leakage up to that point.

A. You said they were re-coopered. Why did they re-cooper them?

Q. Because they were leaking say in one or 2 cases, and they were re-coopered so that that stopped the leaking, and with all this handling they were delivered without leakage. Whether leaking or not, in your opinion they would arrive under that condition you say intact when the ship was at Pier 8, East River. That is your testimony. Do you wish to swear that in your opinion these same casks under these conditions, landing on the dock in bad condition, that that would happen in the ordinary normal course of proper delivery and unloading? Is that your opinion?

A. I certainly think it would happen, knowing the condition of the containers as you have described them.

[fol. 134] WALTER GEORGE COCKS, being duly sworn and examined as a witness for the Claimant, testifies:

By Mr. Crandall:

Q. Do you hold a master's certificate?

A. Yes, sir.

Q. Did you ever go to sea?

A. Yes, nineteen and one-half years.

Q. In what trades?

A. In sailing ships, 4½ years trading to Australia, and steamers for 15 years in various parts of the world; that is, from New York to the Far East, to the West Indies trade, Mediterranean trade and general trades.

Q. What kind of cargo did you carry at sea?

A. Various cargoes, cargoes of oil, brine and casks of olives, and of various other descriptions.

Q. After you quit the sea what did you do?

A. I stayed here in New York as inspector of cargoes.

Q. How long have you been inspector of cargoes in New York?

A. 3½ years.

Q. With whom have you inspected cargoes and with whom are you now?

A. For various companies in New York; the Cunard Line, the Anchor Line, American Hawaiian Line, Garcia & Diaz, Briones & Co., Lloyd Sabaudo, Furness Withy, The Prince Line, the Booth Line, Funch Edye, and the Kerr Line, and sundry others, Lamport & Holt.

[fol. 135] Q. Did you hear the hypothetical question I read to Captain Pilcher?

A. I did.

Q. What can you state as to whether or not the stowage mentioned in that hypothetical question was proper stowage, and whether or not it is the usual and customary method of stowing olives?

Same objection and ruling as before.

Exception.

A. It is excellent stowage. It is rather better than is usual.

Q. Have you ever — any experience in chestnut olive casks?

A. Yes.

Q. What experience have you had?

A. Olives in brine and olives in oil and cherries in brine, in chestnut wood casks.

Q. How often have you inspected olive casks in this port?

A. I have been doing it for five companies for 3½ years.

Q. What conclusion have you come to as the result of your observations during this time of chestnut casks for olives?

A. Usually they come in here and they are old casks, and appear to have been used a great many times. We invariably find that a percentage of the staves are cracked and have to be repaired, and we find the hoops are scattered; that is, on a certain number of them in stowage when the vessel arrived here.

Q. Did you hear the testimony today with regard to the taking of this cargo out of this ship and placing it on the wharf?

A. Yes.

[fol. 136] Q. Have you any fault to find with that?

A. None whatever.

Q. Did you ever hear of unloading olive casks onto 4-wheeled trucks and placing them in their position on the pier?

A. Do you mean apparently sound casks?

Q. Yes.
A. No, sir, we always roll them.

Cross-examined by Mr. Woodruff:

Q. Can one tell by looking at a cask whether it is made of chestnut or of oak?
A. It depends—on some casks, yes. If you would need oak or chestnut casks, you can tell.
Q. But the ordinary cask being received here, you couldn't tell without close examination?
A. Not without close examination, no. If it was old you would probably tell by taking a chip off of it.
Q. If you observed that it was a chestnut cask you would conclude that more care was needed in the handling of it than if it were an oak cask?
A. Not necessarily, depending on the condition of the casks.
Q. Is an ordinary chestnut cask as good as the ordinary oak cask?
A. No, if you take a new oak and chestnut cask you would see that the new oak cask was better than the chestnut cask.
Q. Comparing an old chestnut with an old oak——
A. The oak would be better.
Q. Then we would have to use more care with a chestnut cask than with an oak cask of the same grade?
A. Oh yes, yes.
[fol. 137] Q. Are chestnut casks generally used now?
A. The majority of the casks are chestnut, yes.
Q. You don't see many oak casks now?
A. Not a great many, no; I have seen some.
Q. Did you hear my last line of questions to Captain Pilcher?
A. Yes.
Q. Then assuming the suggestions that I made, bearing in mind that these same casks had two weeks before received all the handling that they had received in the small steamer and going into the large steamer, and had sprung no leaks and that on arriving at New York the casks were unbroken, you would naturally expect that they could be delivered alongside of the ship in fair condition?
A. Am I advised that there had been leakage on the way?
Q. Yes.
A. Then there would be a number of hoops slack, undoubtedly.
Q. Captain Pilcher thought that that would not make any difference?
A. Well, I have noticed that it has where we have a big leakage of brine in the casks which we see in stow, they would invariably get slack.
Q. That would tend to open up the staves and make the——
A. The staves would have to open up, but of course to allow leakage.
Q. Would not the super-imposed cargo tend to bear down and open them?

A. There is not sufficient space to get over the cargo; unless you have a solid cargo, it would not affect the cargo at all. If it is stowed first and entirely chocked up, although the hoops would be slacked up you would hardly notice it in the stowing.

[fol. 138] Q. Could you notice it if you inspected them pretty carefully?

A. If you went down and chopped you would see; you may have one cask slack, or two; that is to say it might be the quarter or the bilge and the head would remain in until the chime end hoop was disturbed. Of course that would throw much more weight on the chime end hoop.

Mr. Crandall: I have one more witness, an expert cooper. He is going to testify as to chestnut casks.

The Court: I don't think I will hear any more testimony. I think you had better close the case.

Testimony closed.

Counsel summed up the case.

The case is submitted.

[fol. 139] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION RE TESTIMONY

It is stipulated by and between the parties hereto that the testimony herein may be taken by a stenographer, signing, certification [fol. 140] and filing being waived, stenographer's fees to be taxable.

It is further agreed that the depositions taken herein may be read in evidence in any other action which may be hereafter brought by Messrs. Harrington, Bigham & Englar, involving damage to olive cargo on the Isla de Panay on the trip in question.

Mr. O'Neill: Is it understood that you will have the original notes of Mr. Carpenter heretofore taken on the depositions of these same witnesses preserved in some form so that they may be accessible for reading as may be required?

Mr. Crandall: Yes, it is so understood.

Robert L. Forbes sworn as interpreter.

ARTURO MUSLERA, being duly sworn, testified as follows on behalf of claimant, through interpreter:

By Mr. Crandall:

Q. What is your name?

A. Arthuro Muslera.

Q. Are you the captain of the Isla de Panay?
A. Yes, sir.
Q. How long have you been captain of this ship?
A. From January, 1917.
[fol. 141] Q. Where did you take command of her?
A. Bilboa.
Q. How long have you been going to sea?
A. From 1888.
Q. How long have you had your master's license?
A. From 1891.
Q. How long have you been employed by the Spanish Line?
A. From 1896.
Q. Were you the captain of the Isla de Panay on the trip of this ship terminating at New York, November, 1917?
A. Yes, sir.
Q. What is the gross and net tonnage of this vessel?
A. 2,484 gross, 2,087 net.
Q. What is her length?
A. 110 metres.
Q. She is an iron vessel?
A. Yes, sir.
Q. And into what compartments is she divided?
A. Seven compartments in the ship.
Q. How many holds did the vessel have?
A. Four.
Q. Did she have four upper tween decks and four lower tween decks?
A. Yes, sir.
Q. Beside the engine and boiler room compartments?
A. Yes, sir.
Q. I show you a plan and ask if this is a plan of the Isla de Panay?
A. Yes, sir.
Q. Have you indicated on this plan in pencil the alterations made in this vessel since this plan was made?
A. Yes, sir. This is for freight (indicating a space marked "Cargo" in the No. 4 upper tween decks and indicating a space marked "hospital" in the No. 2 upper tween decks.)

Mr. Crandall: I offer this plan in evidence.
[fol. 142] Mr. O'Neill: I object to it.
Marked Claimant's Exhibit 1.

Q. When was the vessel built?
A. 1882.
Q. Is she what is known as a flush deck ship?
A. Yes, sir.
Q. You were on the vessel practically continuously after she left Barcelona, were you?
A. Yes, sir.
Q. What ports did you stop at after leav- Barcelona?
A. Valenciennes, Almeria, Malaga and Cadiz.

Q. When did you arrive at Cadiz?
A. I arrived on the 4th and sailed on the 5th.
Q. When did you sail from Cadiz?
A. The 5th.
Q. Did you take on cargo at Cadiz?
A. Yes, sir.
Q. Did you take it on the piers or from lighters?
A. Lighters.
Q. Did you take on some olives there?
A. Yes, sir.
Q. What were they contained in, casks or barrels?
A. Casks.
Q. Were they all in casks?
A. Yes, sir.
Q. Did you go ashore at Cadiz?
A. Yes, sir.
Q. Where did these casks of olives come from?
A. Seville.
Q. How did they come down from Seville?
A. On the Mogador.
Q. I show you three bills of lading and ask if these are the bills of lading covering the olives referred to in these actions?
A. Yes, sir.

[143] Mr. Crandall: I offer the bills of lading in evidence.
Mr. O'Neill: Objected to as not properly proven.
Marked Claimant's Exhibits 2, 3 and 4.

Q. I show you two certificates which are printed in English on the one side and Spanish on the other side, and ask you to state what these certificates are?

Mr. O'Neill: Objected to on the ground that the papers speak for themselves.

A. One of them is the certificate of inspection of engines and boiler, and the other one is the inspection of the steamer showing that she is seaworthy and classed as 100 A-1 Lloyds.

Mr. O'Neill: I move to strike out the answer on the ground that the paper will explain fully what is on it.

Q. Does the same certificate appear on either side of the sheet, on the one side in Spanish and on the other side in English?

Mr. O'Neill: Same objection.

A. Yes, sir.
Q. I show you two other certificates and ask you to state what these certificates are.
A. Certificates showing that the repairs and all recommendations of the inspectors were done after the repairing of the steamer here.
[fol. 144] Q. When was the steamer repaired here?
A. From March until June.

Q. Why was she repaired?

Mr. O'Neill: Objected to.

A. Had a fire on board.

Mr. Crandall: I offer the Lloyds certificates in evidence.
Mr. O'Neill: Objected to.
Marked Claimant's Exhibits 5, 6, 7 and 8.
Mr. Crandall: It is hereby stipulated between counsel that photostat copies of the original certificates, Claimant's Exhibits 5, 6, 7 and 8, may be used in the absence of the originals which the captain is obliged to keep on the steamer.
The original Lloyds Certificates issued after the repairs were made are marked Claimant's Exhibits 9 and 10.

Q. How were these casks taken aboard from the lighters?
A. From lighters one by one.
Q. How did they get them onto the ship?
A. With slings.
Q. Did you see the casks as they were lying on lighters?
A. Yes, sir.
Q. Did you observe their condition?
A. Yes, sir.
Q. Will you describe what you observed as to the condition of the casks?
A. You could see that they were very old, that the hoops were [fol. 145] old and rusty, that the heads were warped, deformed, that they were in very bad condition.

Mr. O'Neill: I move to strike out "in a very bad condition."

Q. Where were the lighters lying when you saw the casks on there?
A. They were alongside.
Q. Did you see any of the casks after they were placed on board of the steamer?
A. When I came on board from on shore I saw some of them.
Q. Where were you standing when you saw them?
A. On board.
Q. On the upper deck or in the tween decks or the lower holds?
A. On deck.
Q. What did you observe at that time as to the condition of the casks?
A. That they were very old, they were in very bad condition.

Mr. O'Neill: I move to strike that out "in very bad condition."

Q. Did you make any notation on the bills of lading as to the condition of the casks?

Mr. O'Neill: I object; the bills of lading have been offered by counsel and they speak for themselves.

A. No, because they came direct.

Mr. O'Neill: I move to strike out the reasons on the ground that the witness has not been asked for them.

[fol. 146] A. (Continuing:) Notations were made on the shipping orders.

Q. Why did you not put the notations on the bills of lading at Cadiz?

Mr. O'Neill: Same objection.

A. Because they were through ladings from Seville.

Q. Did you have anything to do with the stowage of the cargo on the ship?

A. Not directly.

Q. Did you go down in the holds and superintend the stowage?

A. No, sir.

Q. You left Cadiz on November 5th, did you?

A. Yes, sir.

Q. And then you proceeded direct to New York?

A. Yes, sir.

Q. What kind of weather did you encounter on this trip?

A. Good and bad.

Q. Describe more particularly the weather.

A. The first few days, good, and upon nearing this side, very bad, and during the middle of the trip, heavy seas, pitching and rolling.

Q. How many days did the bad weather continue?

A. I cannot say exactly. I believe about three or four days.

Q. Did the vessel suffer any mishap?

A. No, sir.

Q. Did the water come over the sides of the ship?

A. No.

Q. When you arrived at New York did you execute a protest?

A. Yes, sir.

[fol. 147] Q. I show you a document and ask if this is a copy of the protest you signed?

A. Yes, sir.

Q. Where is the original protest?

A. In the Spanish Consul's office.

Mr. Crandall: I offer the copy of the protest in evidence.

Marked Claimant's Exhibit 11.

Q. Is there anything in that protest which says the vessel shipped seas?

Mr. O'Neill: I object on the ground that the protest is in without objection and speaks for itself, and on the ground that you have no right to cross-examine your own witness.

A. No, sir. Shipped water on deck, did not come through the sides, it came on deck.

Q. Did any of the water get down in the holds or tween decks?

Mr. O'Neill: I object to it on the ground that it has not been shown so far that he knows or made any examination.

A. No.
Q. Did you have a full crew on this trip?
A. Yes, sir.
Q. Was the boat sufficiently provisioned?
A. Yes, sir.
Q. How many hatchways did you have?
A. Four.
[fol. 148] Q. How were they covered?
A. Wooden hatch covers, two tarpaulins, iron battens around the hatch coaming and wedges.
Q. Were these hatch coamings of steel?
A. Yes, sir.
Q. And the tarpaulins were drawn down over the hatch coamings and fastened with wooden battens and wedged in with wedges?
A. Yes, sir.
Q. Were these new or old tarpaulins?

Mr. O'Neill: Objected to as leading.

A. New.
Q. Who makes up the log?
A. The officers.
Q. Do you approve the log after they have made it up?
A. Yes, sir.
Q. When the vessel arrived at New York did you see the casks unloaded?
A. Yes, sir.
Q. How were they taken out of the ship?
A. One by one slowly.
Q. How did they hoist them out?
A. On slings slowly over the side.
Q. How many casks were in one sling?
A. One.
Q. Did you observe the casks as they were being taken out of the ship in New York?
A. Yes, sir.
Q. Will you describe what you observed as to their condition at that time?
A. That they were in very bad condition, very old.

Mr. O'Neill: I move to strike it out.

Q. State how they looked.
A. Very old.

Mr. O'Neill: I move to strike it out.

[fol. 149] A. (Continuing:) Those where the hoops that were rusty, would break off; if you just touched them they would fall off.
Q. Did you see any of the hoops breaking or falling off?
A. Yes, sir, I saw them break off.

Q. Where were the casks when you saw the hoops breaking and coming off?

A. In the hold, while they were up in the air and being hoisted and in dock.

Q. What did you notice, if anything, as to the heads of the casks?

A. They were warped and deformed, and as the hoops broke off, the weight of the cask being so great, heads would pop out.

Q. Previous to this trip had you ever carried shipments of olives?

A. Yes, sir.

Q. How often prior to these shipments had you carried shipments of olives?

A. Putting all the trips together, about six years.

Q. Can you state approximately how many trips you made during those six years in which you carried olives?

A. About 30 trips.

Q. Taking into consideration your experience in carrying olives what can you state as to whether or not the casks in the present cases were proper containers for olives?

Mr. O'Neill: I object to it on the ground that he is not qualified to answer.

A. They were very bad.

[fol. 150] Mr. O'Neill: I move to strike out the answer.

Q. (Question read.)

A. It was not sufficient.

Q. In what respect were they not sufficient?

Mr. O'Neill: Objected to.

A. In that they were very old, they were too old, particularly that it was very old; they were big but they were very old.

Q. Does the size of these casks have anything to do with their sufficiency as containers?

Mr. O'Neill: Objected to.

A. As the container is big, if they came in smaller sizes they would be better containers.

Q. From your experience in the olive carrying business what can you say as to what is the proper container for olives?

Mr. O'Neill: Objected to.

A. Half casks and new casks and barrels and small barrels. (Indicating size.)

Q. Why is a half cask or a barrel a better container than a large cask 5 feet long and 4 feet in diameter?

Mr. O'Neill: Objected to.

A. Because a cask is very heavy.

Mr. Crandall: Please repeat the question.

[fol. 151] Mr. O'Neill: I object to repeating it at this time.

Q. (Question read.)

A. Because a small container is more solid, stronger.

Q. How long, approximately, do you think the casks in these cases had been in use?

Mr. O'Neill: Objected to on the ground that he is not qualified to answer.

A. The very least that they have been in constant use is two years; a hogshead can be used just as long as the owner of the hogshead would make it last.

Q. How did the casks on these shipments compare with the casks on the previous shipments that you had seen?

Mr. O'Neill: Objected to.

A. These were very old and although the others were not brand new casks, they were very much newer than these. The heads on these were warped, the wood in these was very soggy, and the hoops were very old, and although they were not new in the other shipments they were not in as bad condition as these.

Cross-examination by Mr. O'Neill:

Q. Where are those shipping orders you spoke about, Captain?

A. In Cadiz.

Q. What form are they in, book or a sheet of paper or what?

A. Sheet of paper.

[fol. 152] Q. Anything else on that shipping order for this voyage except your notation that these containers were not sound?

A. No, sir.

Q. Nothing else but that one statement concerning this shipment?

A. Very old containers that they were not responsible for leakage; the notation that the officer put down is that these casks would be shipped in better condition.

Q. Did you tell that to the Port Wardens here in New York?

A. Yes, sir.

Q. Who is the Port Warden you told that to in New York?

A. I don't remember.

Q. Do you not know who it was you told it to in New York, that this notation was made that these casks were in bad shape?

A. I do not remember.

Q. How old was the ship?

A. From 1882.

Q. The barrels were about two years old, do you think, and the ship is 36 years old; is that correct?

A. I cannot say exactly how old the barrels were, and they might have been 20 years as well as 2 years old.

Q. You think those barrels were 20 years old, do you?

A. Yes, sir.

Q. What are the oldest casks that you have ever seen carrying olives across the Atlantic?

A. These.

Q. What is the next that you have seen; these you say were 20 years old?

A. I am not a cooper to say exactly how old they were; they might have been 20 years as well as 2 years old. But if I was the shipper of those olives I would never have shipped them in a container such [fol. 153] as these, because they would never reach their destination.

Q. When did you first know that these goods would never reach their destination in those containers?

A. I saw them for the first time when they were alongside of the ship, and again when I came on board of the ship from shore, those that could be seen from the hatchway.

Q. And those that you saw down on the lighter alongside of your ship you knew would never carry their contents to New York, did you not?

A. That they were old, I can say, but I cannot say that they would never reach their destination.

Q. What did you say a moment ago that these containers would never deliver their contents to destination?

A. Because I reduce that from the fact, although they were taken on board and very carefully handled, when they were taken out at New York the bad condition in which they were in.

Q. You have been testifying then for the last few questions and answers merely to your deductions, is that the idea?

A. No.

Q. What are you testifying about?

A. I want to know what questions I have answered that way.

Q. You have testified to Mr. Crandall that these barrels were about 2 years old and you have told me that they were probably 20; now which is it?

A. I am not a cooper to know exactly whether the casks were 20 years or 2 years, but from what I saw they were in very bad condition and very old.

[fol. 154] Q. You have been attempting to testify here as an expert in determining the age of those casks, have you not?

A. No, I am not an expert on that.

Q. The fact is you do not know anything about the age of those particular casks, do you?

A. I cannot say exactly.

Q. You are just guessing at this time from what you saw; that is a fact, is it not?

A. No.

Q. What are you basing your indefinite statement here on that these casks were probably 2 years old, and in the next breath that they were 20 years old; what are you basing that on?

A. What I have said is that they might have been two years or they might have been 20 years old.

Q. And that is as near as you can come to it, is it?

A. I am not an expert cooper. I cannot say exactly.

Q. Is that as near as you can come to it, that these casks were 2 years old or 20 years old?

A. Cannot come any nearer.

Q. The fact is you do not know anything about it, do you?

A. I cannot say exactly, I calculate that.

Q. Go on, give us your calculations on how you fix this between 2 and 20 years.

A. As I have carried a good many shipments of casks and along coastwise service, we have taken them full of oil and brought back empty, and those casks after a time they begin to look very old; and I can calculate from those facts that they have been at least 2 years in service. If they have been stored with a liquid or trans- [fol. 155] ported just around the city they might last for an indefinite period, but I am not an expert cooper to know the exact age of the barrels.

Q. Do you know anything about the past history of these casks before you took them on board that time?

A. No.

Q. How can you attempt to calculate their age then?

A. Because I have never seen casks as old as these.

Q. That is the only reason you have for saying they may have been 20 years old?

A. I have never seen them as old as these.

Q. And you do not know how old these were, do you?

A. I cannot say how old.

Q. Did you ever see casks before that were 2 years old?

A. Yes, sir, very much better.

Q. You have seen casks before that were better than these?

A. Yes, sir.

Q. And you have seen casks before that you knew were two years old?

A. Two years, better than these.

Q. You have often handled casks that were two years old, have you not?

A. Yes, sir.

Q. How many hours was this ship at Cadiz?

A. One day.

Q. How many hours?

A. Arriving in the morning of the 4th and sailed in the afternoon of the 5th, about 30 hours.

Q. When were these olives put on board?

A. Day and night.

Q. What time of the day did you get to Cadiz?

A. I cannot say exactly; it must be in the logbooks.

[fol. 156] Q. What ship did you say brought these olives down from Seville?

A. The Mogador.

Q. What is she?

A. A steamer.

Q. Whose steamer?
A. The Spanish Line's.
Q. Belonging to your company?
A. Yes, sir.
Q. Where did she get these olives?
A. In Seville.
Q. And there is where this bill of lading was issued—in Seville, was it not?
A. Yes, sir.
Q. How long after you came to anchor in Cadiz was it that these olives were hoisted on board?
A. As soon as the steamer anchored the lighters came alongside.
Q. What lighters?
A. The company's lighters.
Q. This company that owned the Isla de Panay?
A. Yes, sir.
Q. And the company that owned the Mogador?
A. Yes, sir.
Q. And the company that issued these bills of lading?
A. Yes, sir.
Q. Where were your sounding pipes, amidships or in the wings?
A. Center of the ship and to the sides of the ship.
Q. How many sounding pipes did you have in each bilge?
A. Two sounding tubes at each bilge.
Q. One amidships and one in the wings?
A. One to starboard, one to port.
Q. Were these sounding pipes in the wings on the starboard and port side or were they amidships?
A. They were on the sides.
[fol. 157] Q. What were the hoops usually made of on these casks that you have seen on all other shipments besides this one here?
A. Of newer steel.
Q. They were made of steel, were they not?
A. Yes, sir.
Q. All of them?
A. Yes, sir.
Q. The hoops on these casks were made of steel, were they not?
A. Because they were rusty I could not tell what they were made of.
Q. Do you know what they were made of?
A. I cannot say.
Q. What was the color or appearance of the hoops that you saw on all other casks or barrels that you carried olives in before this?
A. They were brighter, they were newer.
Q. You never saw a rusty hoop on a cask or barrel of olives in your life before you saw those in this shipment, is that correct?
A. As rusty as these, never.
Q. I am asking you whether you saw them rusty at all—not as rusty as these?
A. I am not used to seeing rusty hoops.

Q. Did you ever see a rusty hoop on a barrel or a cask that you have ever carried olives in before this shipment in all your career, yes or no?

A. No.

Q. They have all been bright steel hoops?

A. In good state.

Q. Bright new hoops is what I am asking—yes or no?

A. That they are in good state, I cannot say whether they were all new and bright.

[fol. 158] Q. If they were not all new and bright how did they appear on these other occasions; that is what I want? They were rusty; why do you not be fair about it?

A. Because they were newer than these ones that were carried.

Q. But they were rusty in appearance, were they not?

A. No, no, did not come to that extreme of being rusty.

Q. These were the first rusty hoops that you have ever seen; is that the final word on it?

A. In such an extraordinary state.

Q. I am asking you are these the first rusty hoops you have ever seen and please tell me that yes or no?

A. Yes, sir, that is the only ones I have ever seen.

Q. Did you see any of the hoops come off when they were loading these barrels aboard your steamer at Cadiz?

A. I only saw them on the lighter and on board of the steamer after they were stowed.

Q. Did you not see them coming over the side?

A. No.

Q. What condition were they in when you saw them on the lighter as to the hoops?

A. Bad.

Q. Were the hoops off of them or on them?

A. They were on the barrels but you could see that they were very rusty.

Q. And the next you saw them in the hold and some of the hoops were gone?

A. Some of them off, broken.

Q. Did you see any of the end hoops off at Cadiz?

A. I cannot say exactly whether they were end hoops or not.

[fol. 159] Q. What are the end hoops on there for?

A. To hold the cask and the head down.

Q. The end hoop is on primarily for the purpose of holding the head down, is it not?

A. Yes, sir.

Q. And if the end hoop is gone the likelihood is that the head will come out, isn't that true?

A. Yes, sir.

Q. How did you take them on at Cadiz, did you take them on hanging lengthwise or upright, the heads up and down?

Mr. Crandall: I object to that question inasmuch as the captain has testified he did not see them taken aboard at Cadiz.

A. Around the bilge.
Q. That is, with the heads sideways, not up and down?
A. Yes, sir.
Q. That is how they were taken on from lighters at Cadiz?
A. Yes, sir.
Q. How were these casks discharged at New York?
A. One by one and slowly.
Q. In the same fashion that they were taken on at Cadiz?
A. Yes, sir.
Q. You know that of your own personal knowledge now?
A. Here, yes.
Q. You saw that, did you?
A. Yes, sir.
Q. Did you at any time sample any of this beverage in the bilge that the carpenter enjoyed from time to time?
A. No.
Q. You noticed at Cadiz, did you not, that the heads of these casks were deformed and warped?
A. Yes, sir.
[fol. 160] Q. How many days was it out from Cadiz that you had the three or four days of bad weather?
A. I do not remember—it is in the logbook—as the trip is over now and we get good and bad weather on each trip.
Q. There was no extraordinary weather about this trip, was there?
A. There was heavy winds and sea.
Q. Was it what you ordinarily expect on a voyage of that kind at this time of the year?
A. Cannot expect it or we do not expect it because there are some trips in the winter time which have good weather.
Q. But you expect rough weather in the winter, do you not, on that crossing?
A. Yes, sir.
Q. That is, at this time that this trip was made?
A. Yes, sir.
Q. Did the carpenter ever make any report to you as to what he found in the bilge?
A. He reports to the officer and the officer reports to me.
Q. Did you ever see the carpenter's reports from day to day as to what was in the bilge?
A. Yes, sir.
Q. What were they, written reports?
A. Yes, sir, written reports which were torn up at the end of the trip.
Q. What did those reports say, salt, brine, or what?
A. The amount of liquid in each hold, bilge to the starboard and bilge to the port; if there is anything extraordinary about the soundings, why, they are ordered to pump and the carpenter is called to report exactly what he has found in the bilges.
[fol. 161] Q. Did you see in the carpenter's report a statement

that there was brine or salt water or something like that in the bilges, or what was it?

A. It is the only amount in the bilges and he says verbally what it is.

Q. But he does not put in his report what it was?

A. No.

Q. Did you see these casks unloaded here at New York?

A. Yes, sir.

Q. Were you asked on the hearing a few weeks ago as to just what happened to those barrels as they were being taken of- the ship at New York?

A. I believe, yes.

Q. Did Mr. Crandall ask you about that then?

A. I don't remember; I believe he did.

Q. Did you see any olives come out of those casks at New York?

A. Yes, sir, a good many of them.

Q. Tell us all about how it happened, in your own language.

A. Saw some of the casks, you touch them only and the hoops would come off and the head would come out and the olives would come all over the dock, they were shoveled back into the casks and set on their heads, put the hoops around them, salt and water, put the head back in order to try to preserve the olives. Out of every two that were unloaded one would come apart.

Q. Where were they when they came apart?

A. On the dock.

Q. Whereabouts on the dock?

A. Alongside of the ship, a little farther off, some nearer.

[fol. 162] Q. Those that were a little bit farther away from the ship, how did they get there?

A. Because the hoops may have held a little more than on the others.

Q. How did you get them away from the ship to where they broke off in this way?

A. They were rolled there; the only way to put them there. Those which had their heads broken in alongside of the ship were put on trucks.

Q. Some of them broke apart considerably aways from the side of the ship, did they not, on the pier at New York here?

A. I cannot say exactly; maybe some of them.

Q. And those that were gotten away from the ship in that manner you rolled them there, did you not?

A. Yes, sir.

Q. And those that broke alongside of the ship, you put the olives back in them again, you say, and put the heads on and carried them away to their destination on the wharf, did you not?

A. They fixed them up first.

Q. And then did you carry them away, and how?

A. After they were discharged they were fixed up and they were taken away.

Q. How were they taken away?

A. If they were fixed up good they were rolled; if they were

not fixed up good they were put on trucks and put aside in a place where they could be fixed.

Q. You had the trucks there for use all the time, did you not?

A. Yes, sir.

Q. You say that when you touched these barrels or casks they fell apart; now, do you mean that, yes or no, please?

A. Yes, sir.

[fol. 163] Q. When you commenced hoisting these casks out of the ship you expected you were going to have trouble with them, did you not?

A. Yes, sir.

Q. You looked for trouble with them when you got to New York?

A. Yes, sir.

Q. You knew the condition they were in when you took them off the lighters at Cadiz, did you not?

A. Yes, sir.

Q. How many of the casks did you see coming on board at Cadiz?

A. I cannot say exactly, only a few of them.

Q. Did you make any note in the log about the condition of these casks?

A. There is nothing put on the logs about the casks; there is only notations of the trip.

Redirect examination by Mr. Crandall:

Q. How long a trip is it from Seville to Cadiz?

A. One day.

Q. Do you mean it takes you 24 hours to go from Seville to Cadiz?

A. No, less.

Q. How many hours does it take to go from Seville to Cadiz?

A. Eight or ten hours; sailing in the morning and arriving in the afternoon, 8 hours, because I have been captain of the Mogador before.

Q. You were captain of the Mogador, were you, previous to this trip in question?

A. Yes, sir, a good many years ago.

Q. When did you leave the Mogador?

A. I don't remember the date; must be about 9 years ago.

[fol. 164] Recross-examination by Mr. O'Neill:

Q. Who was the captain of the El Mogador at the time she brought these olives down from Seville?

A. Pastrena.

Q. That is the man that signed this very clean bill of lading for your company at Seville?

A. Yes, sir.

Re-redirect examination by Mr. Crandall:

Q. When you carried olive shipments previous to the ones in question did you observe the method by which the casks were deposited and placed in position on the docks and piers?

A. Yes, sir.

Q. Were they placed in position in any different manner than the manner in which these were placed in position?

A. No, sir.

Q. Is there any other way the casks could have been placed in position on the pier than the manner in which they were placed?

Mr. O'Neill: Objected to.

A. No, sir.

Q. Describe to me how the hoops on these casks looked?

A. Very bad.

Mr. O'Neill: I move to strike out the answer as stating the conclusion of the witness.

Q. State in detail how they looked.

A. Very rusty. You could see that they were very old; with the [fol. 165] least movement they would break off.

Q. Do you mean that they had worn thin?

Mr. O'Neill: Objected to as leading.

A. Very old.

Q. What made the hoops break?-

Mr. O'Neill: Objected to.

A. That they were completely rusty and were very old. Apparently it looks like iron, but it is so rusty that this matter which covers it, rust, could not hold together.

Q. Did the rust appear to be in flakes?

Mr. O'Neill: Objected to as leading.

A. What I call rusty is that matter, reddish matter, which covers the outside of iron, oxidized rust I call that which forms on the outside of iron, and being covered you cannot tell whether the hoops would hold or not, and as these broke off showed that there was no iron in it, there was just rust.

Q. Did the surface of the hoops look smooth or rough?

A. Rough.

Q. What was the difference between the hoops on these casks and the hoops on other casks which you had seen previous to these shipments?

A. That they are not covered with so much rust.

Q. Do you mean that the other hoops had a little rust on them?

[fol. 166] Mr. O'Neill: I object to that as cross examining this witness. This witness has repeatedy stated that he never saw them with rust on before this occasion.

Mr. Crandall: That was the assertion made by counsel for the libellants in his question.

Mr. O'Neill: In which the witness fully acquiesced.

A. Just a little bit, and you can see that the hoops would hold.

Q. I suppose there is always a little rust on hoops, is there not?

Mr. O'Neill: I object to it as again cross examining your witness.

A. When the hoops were put on here at New York they were bright as the sun, they were new.

Q. I presume after the cask has been used a short time there is a little rust collects on the hoops, does it not?

Mr. O'Neill: I object to this as leading and as cross examination of your own witness.

A. Yes, sir.

Re-recross-examination by Mr. O'Neill:

Q. Did I understand you to say that there were some coopers there [fol. 167] on the dock that repaired these casks alongside of the ship after you put them down on the wharf?

A. Yes, sir.

Q. Who were those coopers?

A. Don't know.

Q. Who were they working for?

A. I believe they were for account of the consignees.

Q. They were the consignees' coopers?

A. I don't know for whose account they were.

Q. Who told them to repair the casks?

A. I do not know.

Q. Did you ask them to repair them?

A. The agency might have asked them to.

Q. Agency of what?

A. The agency of the company or the consignee.

Q. When did you first see the coopers there on the wharf?

A. As soon as they began to unload.

Q. Had you seen those coopers on that wharf on other occasions when you came to New York?

A. No, sir.

Q. They were especially this time?

A. I suppose so.

Q. You first saw them there when you commenced taking these casks out?

A. Yes, sir, as they were taken out and they were falling apart.

Q. You knew those casks were in bad shape in the hold, did you not, by reason of the condition you saw them taken on in Cadiz?

A. I suppose so.

Q. Well, did you know it?

A. That they were in bad condition, I knew it.

Q. Did you ask the coopers to go down in the hold and cooper those barrels before you commenced to hoist them?

A. I did not talk to the cooper.

[fol. 168] Q. Did you have any other kind of cargo that turned out in a damaged condition by reason of sea water on this voyage?

Mr. Crandall: I object to the form of the question.

A. What do you mean, from sea water?

Q. Did you have any other damaged packages on this voyage, damaged from anything?

A. I do not remember. We had onions and grapes on board which came out pretty good; from a shipment of 20,000 packages, if 100 or 200 become damaged in some way or other, they do not consider that bad.

Q. On this particular voyage it was our people that had the 100 or 200 damaged packages, was it not?

A. Yes, sir, only yourself; all others came out all right.

Adjourned to March 13, 1918, at 10 A. M.

New York, March 13, 1918.

Taking of depositions continued.

ARTURO MUSLERA, recalled, testified as follows through interpreter:

Re-recross-examination by Mr. O'Neill:

Q. I want to have read to you two questions and answers which [fol. 169] were taken down at the hearing yesterday: "Q. Did you ever see a rusty hoop on a barrel or a cask that you have ever carried olives in before this shipment in all your career, yes or no? A. No. Q. I am asking you are these the first rusty hoops you have ever seen and please answer yes or no. A. Yes, sir, that is the only ones I have ever seen." Now, captain, do you wish to make a correction of that testimony?

A. Yes, sir. That was impossible.

Q. Will you please correct that testimony then?

Mr. O'Neill: I object to this correction of the testimony being made at this time; the witness in the course of his cross examination yesterday in response to several questions had an opportunity to correct it then and did not do so, but persisted in this statement.

A. I have seen a good many rusty hoops because brand new hoops is only when it comes out from being coopered; all barrels on being used, due to the moisture and to the handling, the hoops always rust.

Q. Did you understand those questions yesterday?

A. I did not understand them right from the moment I gave those answers.

Rerecross-examination by Mr. O'Neill:

Q. What did you suppose I was talking about yesterday when at [fol. 170] various times I asked you all forms of questions concerning rusty hoops?

A. I do not remember all the questions that you asked me yesterday, but in regard to rusty hoops, from the moment that water

touches it and it is left in the air, it is rusty. Even when the barrels are being made, the hoops that are put on are sometimes rusty, owing to the transportation of said hoops before they were put on.

Q. The difficulty you have had here, as I understand it, is that you did not understand my questions of yesterday; is that it—yes or no, please?

A. Just how they were asked I did not understand.

Q. But any statements that you made here yesterday which were apparently volunteered by you, you certainly did understand what you were talking about yourself, did you not?

A. No; from the moment that I said that I never saw rusty hoops, because I have been on the seas 30 years and have seen.

Q. Now you are prepared to answer the question, are you not, that was put to you yesterday, that every cask containing olives or every barrel containing olives that you ever carried in your career, the hoops were always rusty more or less?

A. More or less, yes.

[fol. 171] New York, March 13, 1918.

JOSE MA. MIQUEL, being duly sworn, testified as follows through interpreter on behalf of claimant:

By Mr. Crandall:

Q. What is your name?

A. Jose Ma. Miquel.

Q. Are you second officer of the Isla de Panay?

A. Yes, sir.

Q. How long have you been second officer of this ship?

A. From June 28, 1917.

Q. How long have you been employed by the Spanish Line?

A. September 7, 1914.

Q. Did you run on any lines before that?

A. Yes, sir.

Q. What lines?

A. Before this one the Falk Line, and before the Falk Line the McAndrew Line.

Q. How long have you been going to sea?

A. 18 years.

Q. How long have you had a master's certificate?

A. From August, 1904.

Q. Were you the second officer of the Isla de Panay on the trip of this ship terminating at New York in November, 1917?

A. Yes, sir.

Q. Were you on this vessel practically continuously from the time she left Barcelona?

A. Yes, sir.

Q. Did you occupy any other position on the vessel except that of second officer?

A. Purser.

Q. Who made up the cargo book?
A. I did.
[fol. 172] Q. At what ports did you take cargo?
A. Valenciennes, Almeria, Malaga and Cadiz.
Q. You took some cargo at Barcelona also?
A. Yes, sir.
Q. Will you refer to your cargo book and tell me generally what cargo you loaded in Barcelona?
A. Wine, garlic, nougat, almonds; that is all.
Q. The wine was in barrels?
A. In barrels.
Q. What cargo did you take at Valenciennes?
A. Onions and preserves, tartar, one box of saffron.
Q. When you left Barcelona did you know what cargo you were going to load at Cadiz?
A. Yes, sir.
Q. Did you leave a space in the lower holds to stow that cargo in?
A. Yes, sir.
Q. After leaving Valenciennes what was your next port?
A. Almeria.
Q. What did you take there?
A. Grapes.
Q. In what sort of containers were the grapes?
A. In small barrels.
Q. And after that what was the next port?
A. Malaga.
Q. State what you loaded at Malaga.
A. Almonds, mineral—essential oils, raisins, figs; that is all.
Q. You say you took some wine at Malaga?
A. Yes, sir.
Q. Was it in barrels or cases?
A. In cases and in barrels.
Q. What was the essential oil contained in?
A. In drums.
Q. And Cadiz was your next stop?
A. Yes, sir.
[fol. 173] Q. What did you load at Cadiz?
A. Wine, olives, chestnuts and almonds.
Q. What was the wine contained in that you took at Cadiz?
A. In barrels of different sizes.
Q. Will you look at your cargo book and tell me how many casks of olives you loaded at Cadiz?
A. 354.
Q. They were all in casks, were they?
A. Yes, sir.
Q. What was the length of the No. 1, 2, 3 and 4 holds?
A. I have to read from a paper. No. 1, 59 feet; No. 2, 62 feet; No. 3, 44 with an allowance of 8 feet for fan; and No. 4, 72 feet with 26 feet of fan.
Q. What were the fans in Nos. 3 and 4 lower holds?
A. The extremes of the tunnel.

Q. Was the fan in No. 4 lower hold flat on top?
A. Yes, sir.
Q. What was the distance from the top of that fan to the deck of the lower tween decks?
A. 5 feet.
Q. What was the distance from the floor of the hold to the lower tween decks?
A. About 13 feet.
Q. What was the width of the various holds at the widest point?
A. No. 1, 39 feet; No. 2, 41; No. 3, 40; No. 4, 39.
Q. And the shaft tunnel ran through the No. 3 and No. 4 lower holds?
A. Yes, sir.
Q. The cargo was stowed on both sides of the shaft tunnel in those holds, was it?
A. Yes, sir.
Q. Did you have battens running around the side of the ship on the beams?

[fol. 174] Mr. O'Neill: Objected to as leading.

A. Yes, sir.
Q. How long did you stop at Cadiz?
A. About 24 hours.
Q. What were the dimensions of these casks that you took on at Cadiz?
A. About 5 feet long by 4 feet wide.
Q. You understand, of course, that I am referring to the casks of olives?
A. Yes, sir.
Q. Did you have any duties in connection with the stowage of these casks?
A. Yes, sir.
Q. What holds did you have charge of?
A. My own were 3 and 4, but I also had the other two.
Q. Were you down in the holds and in the tween decks when the cargo was loaded at the various ports?
A. Yes, sir.
Q. Where did you stow these casks of olives that were loaded at Cadiz?
A. In the lower holds and a few of them which were left over were put on the mouth of the hatch.
Q. Did you stow the olives in all of the lower holds?
A. Yes, sir.
Q. In the mouth of what hatches did you stow the other ones that were left over?
A. 1, 2 and three.
Q. Of the tween deck hatches?
A. Yes, sir.
Q. Which tween deck?
A. The upper tween deck.
Q. They were stowed in the square of the hatch, were they?
A. Yes, sir.

Q. Did you stow any olives any place else besides in the floor [fol. 175] of the lower holds and in the tween deck hatchways?
A. On the top of the aft fan in No. 4.
Q. How many tiers high were the olives stowed in the four holds?
A. Two.
Q. How many tiers did you have on the fan of the shaft tunnel?
A. One.
Q. How many tiers did you have in the hatchways of the tween decks?
A. One.
Q. The casks in No. 4 and No. 3 were on either side of the shaft tunnel, were they?
A. Yes, sir.
Q. In No. 1 and No. 2 lower holds did the casks of olives extend right across the hold from one side to the other?
A. Side to side.
Q. Will you state whether or not these casks were stowed with their bungs up?
A. Yes, sir.
Q. Was there any cargo loaded underneath the casks of olives?
A. No, sir.
Q. Were the bilges of the casks free of the floor of the holds?
A. Yes, sir.
Q. About how much clearance was there between the bilges and the floor of the holds?
A. Approximately one to two inches.
Q. How did you keep the bilges clear of the floor?
A. By means of wedges at each end.
Q. What were the dimensions of those what you call wedges?
A. At the widest point about 4 or 5 inches.
Q. How long were they?
A. About 4 or 5 feet.
Q. Do you call these quoins?
A. Yes, sir.
Q. Did you have wedges in addition to those quoins?
A. Had two small quoins at each end on each side to keep the casks firm.
[fol. 176] Q. Was each cask in the bottom tier stowed in the same manner?
A. All stowed in the same way.
Q. In the No. 1 and No. 2 lower holds when you came to the stanchious how did you secure the stowage around the stanchions?
A. Put dunnage wood in between.
Q. When you came to the shaft tunnel in Nos. 3 and 4 lower holds what, if anything, did you put between the casks and the tunnel?
A. Dunnage wood.
Q. If there are any spaces between the outside casks and the battens of the ship, what did you put in those spaces, if anything?
A. If there was plenty of room we would put small cargo; if not, wood.
Q. After the olives were stowed were there any empty spaces around the casks in the lower holds?

A. No, sir.

Q. Were the casks that were stowed on top of the fan of the shaft tunnel in the after end of the No. 4 lower hold quoined the same as those which were stowed on the floor of the holds?

Mr. O'Neil: I object to it as leading.

A. The same.

Q. Were the casks in the hatchways of the tween decks quoined and dunnaged the same as those in the lower holds?

A. Yes, sir.

Q. After you laid the first tier of casks in the lower holds I understand you put another tier on top of that?

A. Yes, sir.

[fol. 177] Q. How was the second tier stowed on the first tier?

A. There was one cask in the second tier to every four in the first tier, and as they all formed a hollow it was completely wedged.

Q. And if there were any empty spaces in the holds because of this method of stowage, I understand you to state that you filled them in with small cargo or dunnage wood?

A. With small cargo or dunnage wood.

Q. What was placed on top of the second tier of olives?

A. Chestnuts and wine and small barrels.

Q. Was anything placed on top of this one tier of casks on the fan?

A. No, sir.

Q. Was the No. 4 lower hold completely filled with cargo in front of those casks on the fan?

A. Yes, sir.

Q. What, if anything, did you have stowed around the casks in the square of the No. 1, 2 and 3 tween deck hatchways?

A. Cargo.

Q. Do you remember what kind of cargo it was?

A. Bags and cases of chestnuts.

Q. Were all spaces around these casks in the tween decks filled with cargo?

A. Completely filled.

Q. I show you a cargo plan and ask if this cargo plan was prepared by the chief officer, yourself and me in association?

A. Yes, sir.

Q. Does this show approximately the distribution of the cargo on this trip?

A. Yes, sir.

Q. Did I designate the location in English of the various items of cargo at your request?

A. Yes, sir.

[fol. 178] Mr. Crandall: I offer the cargo plan in evidence.

Marked Claimant's Exhibit No. 12.

Q. Do these letters B, V, A, M and C which appear opposite the items of cargo indicate the ports at which that cargo was loaded?

A. Yes, sir.

Q. That is, those letters represent Barcelona, Valenciennes, Almeria, Malaga and Cadiz?

A. Yes, sir.

Q. And these four rectangular spaces in the holds Nos. 1, 2, 3 and 4, marked "olives" represent the spaces taken up by the olives mentioned in these actions, do they?

A. Yes, sir.

Q. And also the rectangular space on top of the shaft tunnel marked "olives?"

A. Yes, sir.

Q. And also the rectangular spaces in the hatchways of Nos. 1, 2, and 3 upper tween decks marked "olives?"

A. Yes, sir.

Q. These olives which were stowed in the hatchways had chestnuts on top of them, did they?

A. Yes, sir.

Q. And chestnuts on both sides of them, according to this plan?

A. Yes, sir.

Q. I notice that you had some coal in No. 2 lower hold aft end?

A. Yes, sir.

Q. When was that coal used?

A. Did not use it during the trip.

Q. During what trip?

A. The trip in question.

Q. From Barcelona to New York?

A. From Barcelona to New York it was not touched.

Q. I notice this coal inclines from the floor of the hold to the aft [fol. 179] toward the tween decks.

A. Yes, sir.

Q. Did you have any covering over that coal at the forward end?

A. Tarpaulins.

Q. Was this space over the tarpaulins all filled in with cargo?

A. Yes, sir.

Q. And in front of the casks of olives?

A. Yes, sir.

Q. That is between the casks of olives and the coal?

A. Yes, sir.

Q. Will you state whether or not the holds and bilges were cleaned out at Barcelona before you started to load cargo?

A. Before loading the holds the bilges were cleaned.

Q. About what was the weight of these casks, each?

A. About 750 kilos.

Q. Do you recollect how much space those at Barcelona told you to leave for the stowage of the Cadiz cargo?

A. About 850 cubic metres.

Q. Were the casks of olives at any place on the vessel stowed more than two tiers high?

A. No, sir.

Q. Was there any covering over the shaft tunnel?

A. Wood.

Q. What was the size of these wine barrels you loaded at Cadiz?

A. There were several sizes.

Q. Approximately what was the size?

A. One about ¼, 1/5, 1/6 of the size of one of those casks.

Q. How much space in height did the casks of olives take up in the holds?

A. About 8 feet, maybe 9 feet.

[fol. 180] Q. How did you load the casks of olives at Cadiz?

A. With slings.

Q. Were they taken on from lighters or from the dock?

A. Lighters.

Q. How many casks would you put in a sling?

A. One.

Q. How was the sling made fast to the cask?

A. I do not know how to explain that.

Q. I suppose it had a loop on each end and was drawn through at the top?

A. It is very difficult to explain, if you want to I will make a drawing of it.

Q. Did you observe the condition of these casks at Cadiz?

A. Yes, sir.

Q. Will you describe in detail how they looked?

A. That the casks were very old, that the hoops were very rusty and used; that the heads instead of being plain, they were warped, and the liquid came out from them.

Q. Did any of the hoops come off as the casks were being taken aboard at Cadiz?

A. They would break off.

Q. I suppose after a barrel has left the cooper's all of the hoops get a little rusty on the surface, do they not?

Mr. O'Neill: Objected to as leading.

A. After a short time, yes.

Q. How did the hoops of the casks in these cases differ from other hoops that were rusty?

A. A good hoop, even though it is rusty, has a small layer of rust on the top; when you pass the hand over it it comes off, and these casks in question, the hoops had more than a layer on; it was thick [fol. 181] on it. It is a great difference between the two hoops. You can tell first sight.

Q. When you say you passed the hand over it and it comes off do you mean the rust comes off?

A. On the new hoop when you pass your hand over the hoop the rust comes off, but in these cases when you pass the hand, the rust would not come off; it was solid on.

Q. Did you notice whether the rusty condition extended clear through the hoop?

Mr. O'Neill: Objected to as leading.

A. It is possible that some of them were even right through.

Q. What proportion of the casks do you think were in this condition?

Mr. O'Neill: I object to it as incompetent and irrelevant.

A. The majority of them.

Q. Were there any new casks of olives taken on at Cadiz?
A. None.
Q. Were any shipping orders presented when the casks were loaded?
A. Yes, sir.
Q. Who presented those shipping orders?
A. The lighter captain.
Q. Did you make any notation on the shipping orders?
A. Yes, sir.
Q. The shipping orders for these olives?
A. Yes, sir.
Q. What notation did you put on there?
A. That the casks came in a very bad condition, leaking, with [fol. 182] very old hoops, and in some cases some missing.
Q. These olives came down from Seville, did they?
A. Yes, sir.
Q. What steamer did they come on?
A. The Mogador.
Q. I show you four books and ask if these are the logbooks for the ship in question?
A. Yes, sir.
Q. Who makes up these logs?
A. The officers.
Q. Are they approved by the captain?
A. Yes, sir.
Q. Will you look at the logs and state to me the nature of the weather encountered by the ship from day to day after leaving Cadiz for New York on this trip?
A. The day's run, the 5th to the 6th of November, light winds, good weather; 6th to 7th, good weather; 7th to 8th, good weather; 8th to 9th, the same; 9th to 10th, and from 10th to 11th, the same; from 11th to 12th, there was winds from the southwest and heavy seas.

Mr. O'Neill: At that point has he the wind on the Beaufort scale?

Q. Put down the Beaufort scale.
A. Began at noon with No. 4, at 8 o'clock at night, 5 from the south; on noon of the 12th, 6, and continued 6 all that day's run.
Q. Give the condition of the weather and the wind by the Beaufort scale.
A. All these winds from the south carried rain with them. On [fol. 183] the day's run, 13th to 14th, at 12 o'clock, it came down to 5, but the sea continued heavy; at 4 o'clock in the morning of the 14th the wind was 2 with a moderate sea, and stopped raining; the same weather continued on the day's run from the 14th to the 15th; the 16th at midnight, wind changed to the south, 3, with again heavy seas and squalls; at 4 o'clock in the morning, 4, and continued the same way until noon; at noon on the 16th, again changed to the south, and again blew up to No. 6; at 8 o'clock it changed to the southwest with No. 7, heavy seas with a good many squalls; at 4 o'clock wind changed to the west, also with No. 7; at that hour it

began to moderate and at noon it was down to 5; in the afternoon it changed to southwest with No. 4, but the sea continued heavy; during the first 8 hours it was very variable winds; on the 17th at 8 o'clock at night, changed to the north with No. 4 and continued to moderate and continued that way until No. 3 from the northwest, clear weather, and in that way we arrived at New York.

Q. Look at your log and tell me when the vessel arrived at Cadiz and when it left Cadiz on this trip?

A. At 2 o'clock in the afternoon of the 4th of November, and sailed from Cadiz at 5 o'clock in the afternoon of the 5th of November.

Q. Where did the ship unload her cargo at New York?

A. Pier 8.

Q. Pier 8, East River?

A. Yes, sir.

Q. That is a covered pier, is it?

A. Yes, sir.

[fol. 184] Q. Did you see the olives unloaded here?

A. Yes, sir.

Q. Where were you when they unloaded?

A. On board of her on the dock.

Q. Were you down in the holds before the olives were taken out?

A. I could not go down because it was all filled up.

Q. I mean after the other cargo was taken out?

A. Yes, sir.

Q. You saw the olives in the holds, did you, before they were taken out?

A. Yes, sir.

Q. Will you state whether any of the casks had broken out of the stowage on the trip?

A. No, sir, none.

Q. Were all of the casks in all of the lower holds and on the fan of the shaft tunnel and in the square of the hatchways of the tween decks in the same position when they arrived at New York as when they were stowed at Cadiz?

A. Yes, sir.

Q. How were the casks unloaded here?

A. One by one with a sling.

Q. Did you observe the condition of the casks here as they were unloaded?

A. Yes, sir.

Q. Will you state in detail how they looked as they were being taken off the ship and placed on the dock?

A. They were in the same condition as when they were taken on at Cadiz, with the only difference that when they were put ashore and they rolled them a little bit the principal hoops would break off and the heads would come out.

[fol. 185] Q. Did you see any of the hoops coming off as the casks were being taken out of the holds?

A. Yes, sir, some of them would come off as they were being hoisted?

Q. What casks were rolled into place?

A. The same casks which were unloaded.

Q. Did the stevedores have any platform trucks there opposite the ship?

A. For the other freight, but not for the casks.

Q. Previous to this trip in question had you ever carried olives?

A. Yes, sir.

Q. Between what ports?

A. To Buenos Aires, Havana, Cuba.

Q. For how many years previous to this trip do you think you carried olives?

A. Thirty trips on the Buenos Aires service and some of those trips the ship was completely loaded with olives, and in Cuba I have been anywheres from 10 to 15 times and carried olives for Cuba.

Q. On each of those trips?

A. Yes, sir.

Q. Were the olives carried in casks similar in size to these on some of the trips or all of them?

A. None.

Q. I mean similar in size?

A. In size, yes.

Q. Did you see those casks unloaded at Buenos Aires and Havana?

A. Yes, sir.

Q. How did the stevedores unload them?

A. In the same manner that they were discharged here.

Q. Did they roll them into place?

A. In Buenos Aires, yes, but in Havana is the only place where they put them on top of the truck.

[fol. 186] Q. What was the arrangement of the dock at Havana?

A. There were railroad tracks on which these trucks come alongside of the steamer and it is not only for the casks but for all the freight of the steamer; it is put on to these trucks and drawn inside of the warehouse.

Q. You mean in Havana the railroad track runs along the edge of the dock next the steamer?

A. This is the only dock, in Havana, where they have, and the San Jose docks.

Q. Did you find any hoops in the lower holds after the casks were taken out?

A. Not before they were taken out.

Q. I mean after they were taken out?

A. Some of the hoops that broke off as they were being hoisted would fall down into the hold.

Q. Is this a copy of the protest that was executed upon the termination of this trip?

A. Yes, sir.

Q. You were witness to that protest? (Showing witness Respondent's Exhibit 11.)

A. Yes, sir.

Q. Why could not a man use a hand truck to take one of these casks of olives and put it in place on the pier?

A. It takes very long time, and to take it off from the truck to the ground had to put skids, and have to roll it down those skids, and it is running a bigger risk of breaking. If the casks are good the rolling does not make any difference to them, but if they are bad, anything would make them break up.

Q. No matter how much rolling was done?

[fol. 187] A. Never breaks, no matter how much rolling was done.

Q. I am speaking about the bad casks.

A. Even with an old cask, if the hoops were in good condition, they would hold together; but as these would break off the contents would come out.

Q. Did you carry casks on your trips to Buenos Aires and Havana that were 5 feet long and 4 feet in diameter, approximately?

A. Yes, sir.

Q. What kind of casks did you carry to Buenos Aires?

A. Oak casks, new, always, new.

Q. Did they have olives in them too?

A. Filled up with olives.

Q. Did you ever turn out any broken casks on any of the trips to Buenos Aires?

Mr. O'Neill: I object to it as incompetent, irrelevant and immaterial.

A. No, sir.

Q. What was the trouble with the casks in the present cases as containers for olives?

Mr. O'Neill: Same objection.

A. Very old, very used up.

Q. Did the size have anything to do with their sufficiency as containers?

Mr. O'Neill: Objected to as leading.

A. On a cask about a quarter the size of these, with the same kind of wood, they would have held together because the weight [fol. 188] of these casks being so great that it would break them open.

Q. Do you consider that casks of this size when they get old are too large for containers for the carriage of olives?

Mr. O'Neill: I object to it on the ground it is incompetent, irrelevant, immaterial and leading.

A. They are not sufficient—too large.

Q. Were some of these casks when they were taken out of the ship placed on platform trucks on the dock?

A. Those which were broken up and could not be rolled.

Cross-examination by Mr. O'Neill:

Q. Have you ever made any entries in the log about the poor condition of these containers when they were taken on board at Cadiz?

A. No, sir.

Q. Have you ever done it on any other voyage?

A. No, sir.

Q. When the ship reached New York did you unload the olives first or last?

A. Last; the ones in the hold last, the ones in the tween deck first.

Q. The cargo was taken out here at New York as you reached it, is that true?

A. Yes, sir.

Q. Some of the hoops came off when these casks were being put on at Cadiz, did they not?

A. Yes, sir.

[Fol. 189] Q. That is, some of them broke off and more of them slid off the ends?

A. Yes, sir.

Q. Did you notice whether or not any of the extreme end hoops on the barrels came off by the heads?

A. Yes, sir.

Q. That is at Cadiz and at New York?

A. Yes, sir.

Q. When they commenced the unloading of the olives in these casks at New York I suppose some of them broke as soon as they were put down on the dock, is that the idea?

A. Yes, sir.

Q. Did any of them break in the course of the lifting of them out of the hold and swinging them out in the dock while in the sling?

A. Hoops, not casks.

Q. The casks themselves did not commence to break until you were handling them on the dock?

A. Yes, sir.

Q. Some of those that broke right on the dock near the ship were coopered and put on platform trucks, were they not?

A. Yes, sir.

Q. And they were carried away on those platform trucks to whatever part of the wharf they were destined for?

A. Yes, sir.

Q. There were others of these casks that when you put them on the wharf, although they had the hoops off, they did not break at that point but commenced to break after the rolling had started?

A. Some, yes.

Q. Some of them broke near the ship's side on the wharf and others broke down the wharf away from the ship?

A. Yes, sir.

Q. Were the coopers there when the ship arrived?

A. No, sir.

[fol. 190] Q. When were the coopers first seen there?

A. When they began to unload the casks.

Q. Were the coopers asked aboard the ship at any time to go down the hold and put the hoops on?

A. No, sir.

Q. And they only used these platform trucks to carry away the casks that had broken on the wharf near the ship?

A. Yes, sir.

Q. If you roll good new casks they are not likely to break, are they? A. They never break.

Q. What is it that holds the heads in these casks?

A. Three hoops at the end.

Q. It is the extreme end hoop that really holds the head, is it not?

A. Not only the three end hoops, but the hoop which is almost around the bilge of the barrel also holds it in place; in a new cask that hoop holds the staves down so that even though the three hoops at the end would come off, it would still have the tendency to the head not to come out, but on an old cask and with such a great weight as these had in them, whether liquid or olives, it would push it out.

Q. Push the head out?

A. Push the head out.

Q. And that is the very reason why that extreme hoop is primarily put on the casks, to hold the end of the staves in tight around the head so that the head cannot fall out?

A. Not only to hold the ends of the staves in place, but the end hoops overlap the staves in order to protect the ends of the staves.

Q. The trouble with the casks in this ship was that they could not stand this rolling, is that the idea?

[fol. 191] A. The trouble was they were not able to hold the weight which was in them.

Q. And as soon as the rolling started that strain, of course, would naturally cause something to fall out or something to give way?

A. Yes, sir.

Q. On this occasion the highest number you reached on the Beaufort scale was 7?

A. Yes, sir.

Q. And that was for a watch or so, one day?

A. Yes, sir.

Q. And you had 6 for two watches throughout the voyage?

A. Had more for two watches.

Q. The 6 for more than two watches?

A. Yes, sir.

Q. About how many watches, roughly?

A. Four or five watches.

Q. But they were only on two separate occasions that they extended over?

A. Yes, sir.

Q. And beyond that it was mostly 4, 3, 2, and so on?

A. 4, 5, 3.

Q. Did you ship any seas on the deck that trip?

A. Sprays.

Redirect examination by Mr. Crandall:

Q. How did the condition of the casks of olives from the various holds compare when they were discharged at New York?
A. The worst came from No. 1 and 3 lower holds.

[fol. 192] New York, March 14, 1918.

MIGUEL CORVERA, being duly sworn, testified as follows on behalf of Claimant, through interpreter:

By Mr. Crandall:

Q. What is your name?
A. Miguel Corvera.
Q. Are you the chief officer of the Isla de Panay?
A. Yes, sir.
Q. How long have you been on this ship?
A. Since July.
Q. How long have you been employed by the Spanish Line?
A. Eleven years.
Q. How long have you been going to sea?
A. Seventeen years.
Q. How long have you held a master's certificate?
A. 1906.
Q. Were you the chief officer of this ship on the trip terminating at New York in November, 1917?
A. Yes, sir.
Q. What did you have to do with the stowage of the cargo aboard this ship in Spain?
A. All.
Q. You had supervision of all the holds, did you?
A. Yes, sir.
Q. Did you go down into the holds and into the tween decks while the cargo was being taken aboard?
A. Yes, sir.
Q. You saw the way the cargo was stowed?
A. Yes, sir.
[fol. 193] Q. What ports did the ship stop at on this trip in Spain?
A. Barcelona, Valenciennes, Almeria, Malaga and Cadiz.
Q. I show you Claimant's Exhibit 12, and ask if this is a stowage plan of the ship prepared by you, the second officer and myself in association, and whether this shows approximately the distribution of the various items of cargo at the various Spanish ports on this trip?
A. Yes, sir.
Q. What cargo was taken aboard at Cadiz?
A. We took these olives, chestnuts, some wine barrels and general cargo.

Q. In what containers were the olives carried?
A. In casks.
Q. Were they all in casks?
A. All.
Q. What holds were these olives stowed in?
A. In the four.
Q. Were any olives stowed anywhere except on the floors of the four holds?
A. On the aft fan.
Q. Is that the fan at the after end of No. 4 lower hold?
A. Yes, sir.
Q. That is a part of the tunnel, is it?
A. Yes, sir.
Q. And is the top of that fan flat?
A. Yes, sir.
Q. Do you recollect approximately the length of that fan?
A. 26 feet approximately.
Q. Did you have any olives in the tween decks?
A. In some.
Q. Which tween decks did you have them in?
A. I think it was 1, 2 and 3.
Q. Were those the upper tween decks?
A. Yes, sir.
[fol. 194] Q. What part of the upper tween decks, 1, 2 and 3 were those olives stowed in?
A. In the square of the hatch.
Q. How many tiers high were they there?
A. One.
Q. How many tiers did you have on the fan of the shaft tunnel?
A. One.
Q. How many tiers high were the olives stowed on the floors of the four holds?
A. Two.
Q. Did you have any cargo at all under the olives?
A. No, sir.
Q. Was there any place on the ship where you had the olives stowed more than two tiers high?
A. No, sir.
Q. Did you take on some coal at Cadiz?
A. Yes, sir.
Q. Where was this coal placed?
A. No. 2 lower hold.
Q. When was this coal used?
A. On the return trip.
Q. I notice that according to the cargo plan this coal inclined from the floor of the hold back toward the lower tween desks?
A. Yes, sir.
Q. And what did you have covering the coal, if anything?
A. Small cargo.
Q. Did you have anything in between the small cargo and the coal?

A. Yes, some tarpaulins.
Q. Did they completely cover the coal?
A. Yes, sir.
Q. Was this space between the olives and the coal completely filled with cargo in No. 2 lower hold?
A. Completely.
[fol. 195] Q. Do these spaces on this cargo plan in No. 1, 2, 3 and 4 lower holds marked "olives" and on top of the shaft tunnel fan marked "olives" and in the square of the hatchways of No. 1, 2 and 3 upper tween decks marked "olives," indicate the olives carried on this trip and referred to in these actions?
A. Yes, sir.
Q. How were the olives loaded at Cadiz?
A. Slings.
Q. Were they taken on from lighters?
A. Yes, sir.
Q. How many casks were placed in a sling?
A. One.
Q. Where did these olives come from?
A. Seville.
Q. How did they get down from Seville.
A. By the steamer Mogador.
Q. Did you take on any olives before you got to Cadiz on this trip?
A. No, sir.
Q. Approximately how long did you stop at Cadiz?
A. 24 hours.
Q. Were these casks of olives in the lower holds and in the tween decks and on the shaft on the fan stowed with their bungs up?
A. Yes, sir.
Q. Will you state whether or not the bilges of all of these casks were free and clear of the floor of the hold?
A. Yes, sir.
Q. How did you accomplish that clearance?
A. By the quoins that were at the head of the casks.
Q. Did you have wedges in addition to the quoins at the ends?
A. On each side of the head so as not to roll.
[fol. 196] Q. Was each barrel placed upon the quoins in the same way?
A. The first tier, yes.
Q. Were all the casks wedged in the same manner in the first tier?
A. All.
Q. What was the length and thickness of those quoins under the ends of the casks approximately?
A. About 6 inches thick, about 8 inches long.
Q. Approximately what was the clearance under the bilges?
A. 2½ to 3 inches.
Q. Did you have the same quoins under the casks on the shaft tunnel fan?
A. The same.

Q. And the same under the casks in the hatchways of the three upper tween decks?
A. Yes, sir.
Q. Were those casks in the upper tween decks and on the fan stowed with their bungs up also?
A. Yes, sir.
Q. And did those casks also have a clearance under the bilges?
A. Yes, sir.

Mr. O'Neill: I want to note an objection to all this form of questioning on the ground that it is leading.

Q. When you came to the stanchions in the 1 and 2 lower holds how did you stow your casks?
A. Put dunnage wood.
Q. Put dunnage wood where?
A. Between the casks and the stanchions.
Q. What did you put between the casks and the shaft tunnel?
A. Wood also.
Q. What did you have running around the side of the ship on top of the frames?
A. Wood.
[fol. 197] Q. Is that what you call wooden battens?
A. Yes, sir.
Q. If there was any space between any of the casks and these battens what was done with that space?
A. If there was room for small cargo it was put in, otherwise dunnage wood.
Q. Did you fill up all the spaces?
A. All.
Q. After you laid down the first tier on the floors of the holds you placed another tier on top of that, did you?
A. Yes, sir.
Q. How was the second tier laid on the first tier?
A. One on every four.
Q. What cargo was stowed on top of the second tier?
A. Small barrels, cases, and chestnuts.
Q. Cases of wine?
A. Yes, sir.
Q. Cases of chestnuts also?
A. Yes, sir.
Q. Was any cargo stowed on top of the casks on the fan?
A. Yes, sir, some bags of chestnuts.
Q. What was the distance from the top of the fan to the tween decks, have you a note of that here?
A. Yes, sir.
Q. Look at your note and refresh your recollection and tell me.
A. 5 feet.
Q. What was the approximate diameter of these casks?
A. 8 feet.
Q. What do you mean by 8 feet?
A. Circumference; the diameter is 4 feet.

Q. You have not got any cargo marked on top of the fan on this cargo plan?

Mr. O'Neill: I object as cross examination of your own witness.

[fol. 198] A. There is nothing on there but there was some put in. The bags of chestnuts are not marked on there.

Q. We had better mark it.

Mr. Crandall marks "Bags of chestnuts" in English at the request of the chief officer.

Q. What cargo, if any did you have stowed around the casks of olives in the upper tween decks?

A. With chestnuts from Cadiz.

Q. Were all these spaces in the upper tween decks completely filled with cargo?

A. Yes, sir.

Q. Did you have some coal in the bunkers at Barcelona?

A. If there was any it was only a little.

Q. You had some coal on the ship in Barcelona, did you not?

A. We took coal in Barcelona.

Q. How much did you take there?

A. I don't remember now.

Q. Did you know at Barcelona what cargo you were going to take at Cadiz?

A. Yes, sir.

Q. And you were told to leave a certain space, were you?

A. Yes, sir.

Q. The shaft tunnel of course runs through the No. 3 and No. 4 lower holds?

A. Yes, sir.

Q. And in those holds you had the olives stowed on either side of the shaft tunnel?

A. Yes, sir.

Q. Was the space in the lower hold No. 4 on top of the olives and [fol. 199] in front of the olives on the fan completely filled in with cargo?

A. Yes, sir.

Q. What is the approximate distance from the floors of the holds to the lower tween decks?

A. About 13 feet.

Q. Did you look at these casks of olives as they were being stowed and taken aboard and stowed at Cadiz?

A. Yes, sir.

Q. Did you observe their condition?

A. Yes, sir.

Q. Will you now state in detail what you observed as to their condition at that time?

A. The casks very old, the heads deformed, the staves somewhat apart and liquid coming out, the hoops rusty and some of them broken.

Q. Did you have any extra supply of hoops on board to put on any of these casks?

A. No.

Q. What are the duties of the carpenter?

Mr. O'Neill: I object to that.

A. With respect to the cargo?

Q. No, I did not ask you that.

A. Has charge of the bilges, the sweet water tanks; to mend things that are broken on board.

Q. What do you mean by "things that are broken on board?"

A. Any box that might be broken or any woodwork that might be broken on board.

Q. Supposing you had had a supply of hoops aboard to replace the hoops which broke or came off from these casks, how long would it have taken the carpenter to have coopered the casks?

[fol. 200] Mr. O'Neill: I object to that on the ground that the witness is not qualified to answer it.

A. In the first place, the carpenter is not a cooper. They need coopers for that. And in the second place, if he did do that, to put all the hoops that came off would need at least 8 to 10 days.

Q. Were there any emptly spaces in any of the holds or tween decks which would have permitted any of the casks to have broken out of the stowage and rolled around?

Mr. O'Neill: Objected to.

A. No, sir.

Q. Did the carpenter make any report to you as to his soundings of the bilges?

A. Yes, sir.

Q. Did he report to you finding any liquid in the bilges beside the ordinary bilge water?

A. Yes, sir.

Q. What did he say?

Mr. O'Neill: I object to it on the ground that it is hearsay and in no way binding on these libellants, and on the further ground that it is incompetent, irrelevant and immaterial.

A. That he found a sort of brine.

Q. What was the nature of the weather encountered by you on this trip?

A. The weather that you find in November.

Q. What kind was that?

A. Moderate weather, not very bad.

[fol. 201] Q. Did you go down into the holds and tween decks as the cargo was being taken out at New York?

A. Yes, sir.

Q. Did you see these casks of olives before they were taken out of the ships here?

A. No, as they were being taken out.

Q. Did you notice whether any of them had moved out of position in the holds?

A. No, sir.

Q. What does that mean, that you did not notice them or that they had not moved?

A. That they had not moved.

Q. You say you went down into the holds as they were taking them out?

A. Yes, sir.

Q. And you saw them as they were stowed in the holds, did you, here?

A. Yes, sir.

Q. After the upper cargo had been removed so that you could get down?

A. Yes, sir.

Q. Will you state whether or not the casks were in the same position in the stowage at New York as when they were stowed aboard the ship at Cadiz?

A. Yes, sir.

Q. Did the casks come out of all four holds in equally bad condition?

A. The worst came out from No. 1 and No. 3.

Q. Do you recollect whether the carpenter came to you with the sounding rod on this trip, or not?

Mr. O'Neill: I object to it as leading.

A. Yes, sir.

Q. What did you do with the sounding rod?

A. When he drawed it I touched it and found a sandy, greasy [fol. 202] substance there, and after I smelled it I decided it was olives.

Q. Do you mean olive brine?

A. Olive brine, because the olives could not be there.

Q. Did you make any plan of the distribution of the cargo when you were in Spain on this trip?

A. Plan—no; I kept book.

Q. Did you make any drawing showing where the cargo was distributed around the ship?

A. Yes, for my own use.

Q. What did you use that plan for?

A. While I was in Spanish ports to know where the spaces were in order to stow the cargo in those spaces.

Q. What did you do with that plan?

A. Two days after we left Cadiz I threw it out.

Q. How were the casks taken out of the ship here?

A. With slings, one by one.

Q. Were any platform trucks used by the stevedores?

A. Yes, sir.

Q. What did they use those platform trucks for?

A. Got various uses.

Q. Cannot you state some of them?

A. For instance, as they take a sling of almonds out, instead of taking case by case they put the sling as it comes out of the hold on the truck and take it away.

Q. Were any of these casks placed upon those platform trucks?

A. When some cask comes out in very bad condition, very broken up, whether olives or wine, it is placed as it is unloaded on trucks and taken away.

Q. Why could not a man take a cask and put it on a hand truck [fol. 203] and place it in position on the pier?

A. Because it is too heavy; they cannot handle it.

Q. What is the usual method of placing those casks in position on the pier after they are taken out of the ship?

A. Rolling them.

Cross-examination by Mr. O'Neill:

Q. When did you first see the bills of lading in this case?

A. Here.

Q. Did not the ship have a copy of them?

A. These are the first ones that I saw. The copies that the ship has are from Cadiz.

Q. Where did you get them?

A. They did not give me any.

Q. What is your usual custom; do you not have a set of bills of lading handed to you on board the ship when the cargo is turned over to you?

A. In Cadiz they use a shipping order.

Q. As chief officer of the vessel you are a sort of super-cargo as well, that is your duty?

A. No, sir.

Q. Does not the chief officer on your line have sort of special care of the cargo in the holds, and the stowage?

A. Yes, the cargo and the stowage.

Q. You have charge of that?

A. Yes, sir.

Q. You have charge of receiving the cargo when it comes on, do you not?

A. Yes, sir.

Q. And when the cargo comes on and these different consignments arrive on board, do you not receive copies of the bills of lading to check up the packages, and so on?

A. In other ports they do, but not at Cadiz.

[fol. 204] Q. Never in Cadiz?

A. Never. What they do in Cadiz is to send the cargo with shipping orders, the bills of lading stayed in the company's office. The captain goes ashore and signs them; I never see the bills of lading, and what the steamer gets is a set that they send from the office.

Q. What captain goes ashore and signs them?

A. The captain of the steamer.

Q. Of what steamer in this case?

A. The captain of the Panay.

Q. When does he sign them, after the cargo gets on board or before?

A. Sometimes they sign it before, sometimes after; once he goes ashore at Cadiz he does not come back until the documents are brought on board. The bills of lading as they come in from Seville, they do not come direct to us, but they go through the shipper to the Cadiz office.

Q. They go to the shipper in the Cadiz office?

A. They go through the shipper to the Cadiz office.

Q. In Spain do you sign bills of lading for cargo before you actually get it?

A. No, sir.

Q. The bills of lading are signed after the cargo has been received?

A. Yes, sir.

Q. I do not want to know the contents of your sailing orders when I ask about it, and please answer anything that I may ask you about these sailing orders. Who makes out the sailing orders for the Isla de Panay at Cadiz?

A. The company disposes the time that she should sail.

[fol. 205] Q. Who makes out the shipping orders?

A. The agency.

Q. And they are prepared after the packages are in the custody of the ship or the company, is that correct?

A. Yes, sir.

Q. When you saw this cargo going on board the Isla de Panay at Cadiz were all these casks in bad conditiin?

A. Nearly all.

Q. That is, taking the entire shipment of three hundred and some odd casks, they were practically all in bad condition from what you saw, is that correct?

A. Yes, the majority.

Q. How many casks would you say were in bad condition?

A. 300 of them, some odd.

Q. Assuming that there were 354 altogether, how many out of the 354 would you say were in bad condition as you have described here?

A. Nearly all.

Q. 354 or 325 or what?

A. About 325.

Q. How many casks did you put in No. 1 hold between decks and lower, altogether?

A. I don't remember.

Q. About how many?

A. I don't remember.

Q. A quarter of the entire shipment, would you say?

A. Something like that.

Q. How many would you say were in No. 2?

A. I don't remember.

Q. Approximately another quarter of them were in there, would you say?

A. Yes, sir.
Q. Another quarter in No. 3 approximately?
A. Yes, sir.
Q. And another quarter in No. 4 approximately?
A. Yes, sir.
Q. In other words, generally speaking in numbers they were about [fol. 206] equally distributed between the four holds, is that correct?
A. Yes, sir.
Q. In No. 1 hold about how many of the quarter of them that were in there would you say were down in the lower hold, on the floor of the hold?
A. I don't know.
Q. Assume that in No. 1 hold there were altogether, we will say, 75 casks; how many of the 75 would you say were down in the lower hold and how many in the tween deck of the No. 1 hatch?
A. The majority were in the holds; there was very few in the square of the hatch.
Q. In the No. 1 and No. 3 holds they turned out very bad at New York, did they not?
A. Yes, sir.
Q. They were not so bad in No. 2 and 4?
A. No, sir.
Q. Which of the holds would you say the casks were taken out of that afterwards broke on the dock that has been testified to here?
A. No. 3.
Q. Do you think that they all came out of No. 3?
A. From No. 1, also some came out.
Q. Some came out of No. 1 also that afterwards broke on the dock?
A. Yes, sir.
Q. About how many altogether broke open on the dock?
A. I don't know.
Q. Approximately?
A. I cannot say because I don't remember.
Q. Five, ten?
A. At least twenty; I saw a good many of them.
Q. You were there superintending the discharge, were you not? [fol. 207] A. I was not there to count the casks, I was there for other cargo as well.
Q. But you were there superintending the discharge generally?
A. Yes, sir.
Q. How many would you say at the outside broke on the dock?
A. About 15, 20.
Q. And of the 15 or 20 how many came out of hold No. 3?
A. Ten or so.
Q. And about 5 or 10 more came out of No. 1, is that correct?
A. Yes, sir.
Q. And the No. 2 and No. 4 made a substantially good showing?
A. Yes, sir.

The Interpreter: I put that last question to him in the way that it is given, that the casks that came out of 2 and 4 came out good; he says "good, not," and then I said, "a good appearance," and he says, "a good appearance, yes."

Mr. O'Neill: That was speaking about holds 2 and 4.

The Interpreter: 2 and 4.

Q. Where is the No. 1 hold here?

A. (Indicating.)

Q. This shows where it is marked C, where you had the olives does it not?

A. Yes, sir.

Q. Now, it appears from your plan that on top of the olives of the No. 1 hold you had piled barrels and cases of wine as well as cases of chestnuts?

A. Yes, sir.

Q. And you had wine in barrels both fore and aft of the olives on the floor of lower hold No. 1, that is true, is it not?

A. Yes, sir.

[fol. 208] Q. You had cases of wine and chestnuts piled up on top of the barrels of wine again under hatch No. 1 in the lower tween decks, did you not?

A. Yes, sir, in the lower tween deck, that this space is closed in.

Q. In other words, the hatch cover on the floor of the lower tween decks was closed?

A. Yes, sir.

Q. And on top of those hatch covers you had piled cases of wine?

A. Yes, sir.

Q. Then the upper tween deck hatch was closed and on top of that——

A. Olives.

Q. Where did you take on these cases of wine that you have here on top of the hatch covers on the floor of the lower tween deck?

A. Cadiz.

Q. What was that general cargo here in the lower No. 2 between the pile of coal and the olives?

A. Small cargo.

Q. Do you remember the discharge of this particular cargo in general at New York pretty well?

A. The rest, good.

Q. Do you remember generally about the cargo?

A. Yes, sir.

Q. Do you know whether or not there were any other claims for damage on this particular trip? Think carefully about that.

A. They have not said anything to me.

Q. Practically all your lower hold cargo you took on at Cadiz, did you not?

A. In Malaga and Barcelona also; there is some Malaga cargo and there is also 260 tons of coal from Barcelona, part in Cadiz.

Q. This is the coal referred to here in the lower No. 2?

A. Yes, sir.

[fol. 209] Mr. Crandall: You mean part of the coal was taken at Cadiz?

The Witness: Yes, sir.

Q. Did your ship have a full cargo when she left Cadiz for New York on that trip?

A. Yes, sir.

Q. Were the heads of all the casks of olives in this shipment in deformed and bad condition when they were taken on board at Cadiz?

A. Not all of them, the majority.

Q. How many?

A. About 150.

Q. Where were all those casks with the warped heads placed on board the ship?

A. In the lower holds.

Q. Some of them in No. 1, some in No. 2, some in No. 3, some in No. 4, as they came on board?

A. Yes, sir.

Q. Just as they came on board?

A. Yes, sir.

Q. That is true of those that had the bad hoops, they were scattered all through the four holds, were they not?

A. Yes, sir.

Q. Some of the hoops broke open and others came off the end of the casks?

A. Yes, sir.

Q. Did they make a report when they broke open as you were putting them on at Cadiz?

A. Those that I did not see I was told about.

Q. Those that you saw, where the hoops actually broke open coming over the side at Cadiz, did they make a noise as they broke open?

A. They would fall off into the hold.

Q. Just fall off quietly?

A. Without any noise.

[fol. 210] Q. Did any of the hoops fall into the lighter as they were taking them aboard?

A. I don't remember if any fell on the lighter.

Q. Did any fall on the deck of the Isla de Panay when they came on board?

A. Yes, sir.

Q. Some of them broken open and others had fallen off the ends without breaking?

A. Yes, sir.

Q. And then the casks were lowered into the hold?

A. Yes, sir.

Q. What did you do with these broken hoops that fell on the deck at Cadiz as you were taking them on board?

A. Threw them away.

Q. Threw all these hoops away?

A. It was nothing but rubblish.

Q. You did not keep any of them on board at all?

A. No.

Q. The broken hoops and the loose hoops were all thrown overboard?

A. Yes, sir, all.

Q. In answer to one of Mr. Crandall's questions you said when he asked you about the duties of the carpenter on board, you asked him did he mean with respect to the cargo; you may tell me here just what his duties were with respect to the cargo.

A. To repair some boxes that might come broken.

Q. Repair some packages or containers there that might be broken up in the course of handling?

A. Yes, sir.

Q. You say that the carpenter is not a cooper?

A. No.

Q. You mean that he is not a cooper; you say that?

A. That he is not a cooper.

Q. You are not a cooper?

A. No, sir.

[fol. 211] Q. You never did coopering in your life, did you?

A. No, never. I never heard so much talk about casks in my life until now. I will be a cooper before I get through.

Q. Now, with your present qualifications as a cooper do you not think anybody can put a hoop down over a barrel, a hoop that has fallen off?

A. No, sir.

Q. You could not put a hoop over a barrel yourself and tack it on there, could you?

A. No.

Q. You do not know how to do that?

A. No.

Q. You do not know how to take a ring, which is a hoop, and put it over a barrel and tap it on there and fasten it with a tack or something?

A. No, sir.

Q. And a carpenter would not know how to do that simple trick, would he?

A. No, sir.

Q. Not being a cooper you attempted to estimate how long it would take to do this work; where did you get that experience on which you testified to that time?

A. Although I am not a cooper I understand that it takes a great deal of time to fix up.

Q. The engineer would be a better cooper than you, would he not?

A. Possibly.

Q. It is true he is a mechanic and you are not?

A. Yes.

Q. And the engineer would be a better cooper than you, would he not?

A. It is possible that he might be; I would not dispute that fact.

Q. Will you concede that he is better for that work than you would be?

[fol. 212] A. At least he ought to know a little more than I do.

Q. About coopering?

A. I don't know whether he knows any or not, but he should know it, and I do not know what being a mechanic and cooper has to do one with the other.

Q. The engineer is better qualified to discuss the cooperage business than you are, is he not?

A. No, he does not know anything about cooperage.

Q. Did any of the casks break on the deck of the steamer when they were being unloaded?

A. Yes, sir.

Q. On the deck of the ship?

A. As they were taken off.

Q. Did any actually break on the ship itself, on the deck?

A. As they touched the shore.

Q. Did any actually break open on the deck of the ship?

A. No, sir.

Q. Those that broke did so as they were being landed on the dock?

A. Yes, sir.

Q. When did the carpenter tell you there was brine in the bilges for the first time on this trip?

A. About 4 days out from Cadiz.

Q. Did you ever taste the liquid that was on that sounding rod when the carpenter brought it to you?

A. Yes, sir.

Q. Why did you not tell us that on your direct examination today?

A. Because he did not ask me whether I had tasted it; he asked me whether I had touched it.

Q. Did he not ask you what examination you had made of that sounding rod when it was brought to you?

A. Yes, sir.

[fol. 213] Q. And you told him you felt of it and you smelled it; that is all you told him, was it not?

A. Yes, sir.

Q. How often did he bring that sounding rod to you on the trip?

A. He used to bring it every 4 hours.

Q. Commencing when?

A. From the day that he noticed it, the fourth day out from Cadiz.

Q. The fourth day out from Cadiz was the first time that he called it to your attention?

A. Yes, sir.

Q. These platform trucks were on the dock there all the time when you were unloading these casks?

A. Yes, sir.

Q. Practically all our casks were in very bad condition, were they not?

A. Yes, sir.

Q. When those casks were rolled on the dock some of them fell apart, did they not?

A. Yes, sir.

Q. Casks in the bad condition that these were in will not stand rolling, will they?

A. No, sir.

Q. How many of these casks out of the 354 on board were placed on platform trucks and removed to their place on the wharf in that way?

A. About 20 or so.

Q. Did you taste that sounding rod every time the carpenter brought it to you on that trip?

A. Every time not; two or three times only; *two or three times only;* there was no use of my keeping on tasting it because I knew what the contents was.

Q. What was the color of that sounding rod when you tasted it? [fol. 214] A. Could not see any coloring, it was sort of greasy.

Q. Was the rod a piece of steel or was it rusty or dark, or what was the situation?

A. It was an iron bar covered with crayon.

Q. What was the color of that crayon?

A. White.

Q. Did the carpenter make these reports to you in writing?

A. No, sir.

Q. Just what did the carpenter do concerning these reports he made to you about brine in the hold?

A. He took the sounding, he noticed grease in the level, he came up and advised it and then we told him to advise the engine room.

Q. And that was about 4 days out of Cadiz?

A. Yes, sir.

Q. Did the carpenter have any paper at all in his hand when he came to you?

A. Yes, sir.

Q. He brought the sounding?

A. On a piece of paper, yes, sir.

Q. What became of the paper?

A. It was thrown out at the end of each trip.

Q. Did you keep a stowage book on board the ship?

A. No, sir.

Q. No book?

A. No, sir.

Q. Nothing but a piece of paper?

A. That is all. Those books, officially I ought not to keep any plan book, but privately I make this stowage book, which after I get through with it I throw it away.

Q. Did you note on that stowage book where these olives were?

A. Yes, sir.

Q. Did you note on there where you had this space marked where [fol. 215] the olives were in your private stowage plan, that the casks were in bad shape?

A. No, sir, only the space in which they were.

Q. You did not say anything about the condition they were in when they came on board on this particular stowage plan of yours, did you?

A. No, sir.

Q. Did you expect to find brine in the bilges of that steamer on this particular trip after you left Cadiz?

A. Yes, sir.

Q. When did you expect to find it?

A. When we give it time for it to go through to the bottom.

Q. These barrels were right down on the limber boards, were they not?

A. Yes, sir.

Q. The limber boards have open spaces between them, have they not?

A. There is very small space between, nothing solid can go through it.

Q. But liquid can go through it?

A. Yes, sir.

Q. That is what the limber boards are for?

A. Yes, sir.

Q. To let any water or any liquid that may gather in the hold go right into the bilges so you can pump it out?

A. Yes, sir.

Q. Did you have any ordinary rough winter weather on that trip?

A. Current winter weather, not very bad.

Q. What kind of weather did you have the first day out of Cadiz, as best you can remember?

A. Good.

Q. Second day?

A. It was not bad.

[fol. 216] Q. From what the other witnesses have said in this case they have said something about striking the first rough weather after leaving Cadiz; do you remember just when that was?

A. No, sir.

Q. When did you strike the first rough weather that made the vessel pitch and roll after leaving Cadiz?

A. I don't remember.

Q. Did you have any weather on the entire trip that made the vessel pitch or roll?

A. Yes, sir.

Q. You do not remember when it was, do you?

A. No.

Q. Did you talk about this case or this stowage or anything concerning the case with anybody before you testified here today and before you testified the last time?

A. I talked with a good many people.

Q. About this case?

A. Yes, sir, the last time I was here.

Q. I mean aside from what you said when you were here in the

deposition room on this occasion and on the last occasion that you testified, did you talk to anybody else about the case?

A. Yes, sir, I talked to Mr. Crandall.

Q. Did you talk to Mr. Crandall today about the case?

A. Not today.

Redirect examination by Mr. Crandall:

Q. What kind of packages did the carpenter repair on board the ship?

A. Small boxes and things like that.

Q. He never had done anything to any barrel cargo, had he?

[fol. 217] Mr. O'Neill: Objected to as leading.

A. No, sir.

Q. Was there any way in which to place the casks in position on the pier at New York besides rolling them?

Mr. O'Neill: I object to that as leading.

A. No, sir.

Q. I believe you said that some of the casks with the hoops broken and coming off were placed in No. 2 and No. 4 lower holds?

A. Yes, sir.

Q. Were those casks turned out at New York in the same condition as when taken aboard at Cadiz?

A. Yes, sir.

Q. Was your statement as to the time when the carpenter reported the presence of brine in the bilges to you, after leaving Cadiz, an approximation?

Mr. O'Neill: I object to it as leading and suggestive to the witness, and cross examination.

A. Yes, sir.

Q. You do not undertake to give the exact time, do you?

Mr. O'Neill: I object to it as leading *ing* and as cross examination of your own witness.

A. No.

[fol. 218] Q. Was that after the ship left Cadiz on November 5th?

Mr. O'Neill: I object to that on the ground the question is meaningless.

A. Yes.

Q. After being out some time from Cadiz you put back, did you not?

Mr. O'Neill: I object to that as leading.

A. Yes, sir.

Q. What did you put back for?

A. With the crew of a Danish steamer, a torpedoed boat.

Recross-examination by Mr. O'Neill:

Q. Where did you pick up the crew of this torpedoed vessel?
A. Nearly parallel with Cape St. Vincent.
Q. How many days' sail was that out from Cadiz?
A. About ten hours.
Q. What time did you leave Cadiz, the day of your departure on November 5th?
A. 5 o'clock in the afternoon.
Q. When did you pick up this crew?
A. One o'clock.
Q. In the night?
A. Yes, sir.
Q. What time were you back in Cadiz landing then again?
A. The following day, 12 o'clock.
[fol. 219] Q. Then you sailed from Cadiz immediately again?
A. We did not go to the dock.
Q. Just slowed your engines and let this crew off and proceeded at noon on the 6th to New York?
A. We also lost an hour or so while we were rescuing the crew.
Q. You sailed finally for Cadiz about one o'clock in the afternoon of the 6th?
A. Yes, sir, approximately.
Q. And it was about four days after that that the carpenter reported the olive brine in the bilges?

Mr. Crandall: I object to that as the chief office has just testified it was four days after he first left Cadiz on the 5th.

A. Approximately, yes.

New York, March 12, 1918.

Emilio Bardecci, being duly sworn, testified as follows on behalf of Claimant through interpreter:

By Mr. Crandall:

Q. What is your name?
A. Emilio Bardecci.
Q. Are you the carpenter of the Isla de Panay?
A. Yes, sir.
[fol. 220] Q. Were you the carpenter on this ship on the trip terminating at the port of New York in November, 1917?
A. Yes, sir.
Q. Howl ong have you been going to sea?
A. 19 years.
Q. What are your duties as carpenter of this vessel?
A. To take the soundings and to repair woodwork on the steamer.
Q. Were the bilges of the ship cleaned out at Barcelona before her departure for the United States?
A. They were cleaned and whitewashed in Barcelona.

Q. How did you take the soundings of the bilges?
A. With a rod, line attached to it. I let it down the pipe. First crayon rubbed on the rod and the liquid is marked on that rod.
Q. Was this a graduated rod?
A. It has inches and half inches marked; it is 36 inches long.
Q. Are these Spanish inches?
A. Spanish.
Q. How often did you sound the bilges on this trip?
A. Every four hours.

The Interpreter: A Spanish foot is 11 English inches.

Q. After you took the soundings of the bilges did you make any report of them?
A. To the officer on the watch.
Q. Did you send any report to the engine room?
A. To the officer on the watch and to the engine room.
Q. Do you recollect this November trip?
A. Yes, sir.
[fol. 221] Q. What is the greatest depth of liquid you got in your bilges on this trip?
A. About 16, 17 inches.
Q. What is the average amount of liquid you would get in your bilges on the ordinary trip across the Atlantic?
A. There is always 3 to 4 inches in the bilges.
Q. On this trip what kind of liquid did you get from your bilges?
A. The liquid that came out on the sounding rod, by putting the finger to the rod and then putting on the tongue, it tasted salty.
Q. Can you tell from the taste what kind of liquid it was?
A. Yes, sir.
Q. What kind of liquid was it?

Mr. O'Neill: I object to that on the ground the witness is not qualified to answer.

A. Olive brine.
Q. What kind of brine was it?

Mr. O'Neill: Same objection.

A. It bites, a biting taste.
Q. From what did the brine come, as far as you know?
A. From the casks.
Q. Casks of what?
A. Olive casks.
Q. How did this liquid taste?
A. It had a biting taste, salty and biting taste.
Q. Had you ever tasted brine from olives previous to this trip?
A. Yes, sir.
Q. Did this liquid on the sounding rod taste the same as olive brine which you had previously tasted?
A. The same.

[fol. 222] Q. How can you tell the difference between olive brine and sea water?

A. Because sea water is not biting.

Q. Olive brine is biting, is it?

A. Yes.

Q. Is there any difference in the smell?

A. Yes, sir, there is also a difference.

Q. What is the difference in the smell?

A. The brine has a stronger smell

Q. What bilges did you find olive brine in on this trip?

A. In No. 1 and No. 3. In No. 2 and No. 4 very little.

Q. This vessel took on the casks of olives at Cadiz, did it?

A. Yes, sir.

Q. Did it take them on from lighters?

Mr. O'Neill: Objected to as leading.

A. Yes, sir.

Q. Where were you when the casks were being loaded?

A. On board her.

Q. Whereabouts on board?

A. Near the casks when they were being loaded.

Q. How near the casks were you?

A. Touching them.

Q. How were the casks taken aboard the vessel from the lighters?

A. One by one.

Q. On a sling or how?

A. With slings.

Q. Did you observe the condition of these casks as they were being taken aboard?

A. Yes, sir.

Q. Will you describe in detail how these casks looked when you saw them?

A. The wood was soggy, the hoops rusty, and the general appearance as though they had been handled a great deal.

[fol. 223] Q. Were all the hoops on the casks or were any of them broken off?

Mr. O'Neill: Objected to as leading.

A. There were some missing while others came off as they were being hoisted.

Q. Did you see anything coming out of the casks as they were being loaded?

Mr. O'Neill: Objected to as leading.

A. Yes, sir.

Q. What did you see coming out of them?

A. Liquid coming out.

Q. What did you do with your records of soundings?

A. At the end of each trip they were either torn up or burned.

Q. Was that done on this trip?

A. Yes.

Q. When you found the olive brine on your sounding rod did you make any report to any one of the presence of that brine?

A. To the officer on watch.

Q. Do you remember what officer that was?

A. The first officer.

Q. How did you account for the fact that you had more liquid in your bilges on this trip than usual?

Mr. O'Neill: Objected to as incompetent, irrelevant and immaterial.

A. It had to come out of the casks, that was the only reason.

Q. What casks?

Mr. O'Neill: Same objection.

A. Out of the olive casks.

[fol. 224] Cross-examination by Mr. O'Neill:

Q. Where was that vessel when the holds were swept for this voyage in question?

A. In Barcelona.

Q. What ports did the ship stop at between Barcelona and Cadiz?

A. Malaga, Valenciennes. I am not sure of all of the ports because some of them are provisional ports of call.

Q. The last time you testified you had no difficulty in naming what those ports were, did you?

A. I don't remember; Valenciennes I know.

Q. Valenciennes is the only one you recall now, is that correct?

A. Cadiz also. I don't remember sure, maybe Malaga and Almeria. As I do not have to give any note of that I never take notice of it.

Q. In other words, at this time you are not very certain as to just what those ports of call were on this voyage, are you?

A. I don't remember at this moment because provisional ports and sometimes they call at one and sometimes another.

Q. What was the color of this crayon that you used on this sounding rod?

A. White.

Q. Do you put that on the rod every time you take soundings?

A. Every sounding you rub it on well.

Q. How often do you take soundings?

A. Every four hours.

Q. Did you take soundings every four hours on this trip all the way between Cadiz and New York?

A. Yes, sir.

[fol. 225] Q. Do you recall whether or not that is what you said the last time you were examined?

A. Yes, sir.

Q. You did not say on the last examination that you took those soundings twice a day?

A. Every four hours, I always said.

Q. Did you say the last time you testified that you took these soundings only twice a day?

A. Every four hours in the day I take soundings.

Q. Did you say the last time you were examined here that you took the soundings only twice a day on this trip?

A. It is not true.

Q. The question is not whether it is true or not, but did you or did you not say so the last time you testified here?

A. No, sir.

Q. You did not say that?

A. No, sir.

Q. What is the appearance of this sounding rod before you drop it down into the sounding pipe?

A. I take the rod and pass crayon over it well, all over it, and then I drop it down the sounding pipe.

Q. After you drop it down the sounding pipe, if there is any liquid in the bilge, what is the appearance of the rod then when you draw it up?

A. If there is liquid it marks it on there.

Q. Just tell us what your duties are as carpenter on the ship?

A. Every four hours take soundings.

Q. What else?

A. To take care of the fresh water; if there is any doors or hinges broken for me to fix it.

Q. What do you take soundings for on a ship?

A. To see if there is any liquid in the holds.

[fol. 226] Q. How long was the line on that rod that you took your soundings with?

A. After the rod is let all the way down there is over two metres left.

Q. You do not know the length of that line, do you?

A. Approximately 10 metres, over 10 metres.

Q. What kind of weather did your ship encounter after leaving Cadiz?

A. A very few days after leaving Cadiz, bad weather.

Q. How many days after leaving Cadiz was the bad weather?

A. Approximately 5 or 6 days after.

Q. How long did that bad weather last that you encountered five or six days out from Cadiz?

A. Until the arrival here.

Q. How long did it take you to make the trip from Cadiz to New York on that trip?

A. I don't keep any record of that, I cannot say exactly; I believe about 16 days.

Q. What depth of liquid did you find in your bilges on the last days of that voyage as you approached New York?

A. 15, 16, 17.

Q. Do you know what depth of liquid you found in your hold the last day, just before reaching Sandy Hook here?

A. 15, 16 inches.

Q. What was it two and three days before reaching Sandy Hook?

A. 15, 16 inches.

Q. Over how many days just preceding your arrival at Sandy Hook was it that the soundings in your bilges showed 15 and 16 inches?

A. Every 4 hours.

Q. For how many days was it preceding your arrival at Sandy Hook that you found that depth of liquid in your bilges at 16 and 17 inches?

A. I don't understand the question.

[fol. 227] Q. You say that the first few days before you reached Sandy Hook your soundings every four hours indicated that there were 16 or 17 inches of liquid in your bilges; now I ask you how many days preceding four or five days that you just mentioned, that this condition of 16 and 17 inches appeared in those bilges?

A. Nearly all the days.

Q. On nearly all that voyage your bilges exery four hours showed 16 inches of liquid, is that correct?

A. Not the same on all the soundings; sometimes more, sometimes less.

Q. What was the variance, what did it range between on all your soundings?

A. If it had four inches of liquid in the bilges it would run up to eight, there would be an extra amount up to 8 inches.

Q. If you found 3 or 4 inches in the bilges would you notify the engine department of that?

A. 3 or 4 inches I would not notify the engine room because the pumps would not bail that out.

Q. How much liquid would you have in the bilges of that ship before your pumps would reach the liquid?

A. 4 inches up.

Q. If it got above 4 inches on any one of those 4-hour watches throughout the entire trip, you notified the engine department to set the pumps going, did you not?

A. Yes, sir.

Q. How often did you notify the engine department to start the pumps on this trip?

A. In all soundings that I took because some of them have been 14 and others 16.

Q. So in all soundings you took on that voyage every 4 hours [fol. 228] you notified the engine department to start the pumps, s that correct?

A. Yes, sir.

Q. What is the highest that you ever noticed this liquid to be n your bilges on that trip?

A. 17 inches.

Q. When was that?

A. One day during the trip, I cannot say the exact date.

Q. Whereabouts was the ship, in mid-Atlantic or where?

A. Nearer here.

Q. Did you sample with your tongue the contents of those bilges very four hours throughout that trip?

A. Yes, sir.

Q. So you took a taste of the beverage of the bilge here six times a day for 16 days on that trip?

A. Yes, sir.

Q. Where was the ship when you made your first sounding after leaving Cadiz?

A. As soon as she left Cadiz.

Q. What did you find then?

A. There was an increase in the level.

Q. What was the increase?

A. Some of them had 12, 13 inches.

Q. How soon after leaving Cadiz was that?

A. It was not a day.

Q. How long was it?

A. Four hours after leaving port.

Q. When did you sound last before you left Cadiz?

A. Just before heaving the anchor.

Q. How long before heaving the anchor?

A. About half an hour before.

Q. Was your ship dry then?

A. Some of them had four, some of them had five inches.

Q. When was it that you took soundings of those bilges before this [fol. 229] time, at the departure, while the ship was there at anchor in the harbor of Cadiz?

A. Four hours after the arrival of the steamer at Cadiz and just before sailing.

Q. How long was the steamer in Cadiz?

A. I cannot say the exact hours. I believe she came in on the 4th and sailed on the 5th of November.

Q. Was she there a full 24 hours?

A. I am not sure, working at night time. Those details of exact hours in port I do not take note of that.

Q. Do you take soundings every 4 hours while you are in port?

A. The same as if we were at sea.

Q. When were these olives put on board?

A. In the afternoon or night.

Q. When did the steamer sail?

A. On the 5th.

Q. That was the day after the olives were put on board?

A. Yes, sir.

Q. When you took your first soundings as the steamer sailed you only found 4 inches of liquid in the bilge then?

A. All of them don't run the same; some 4, some 5, some 6.

Q. Did you not say a moment ago that the highest figure that you found was 5 in any of the bilges on that sounding previous to the raising of the anchor?

A. Because the 4 hours before they had pumped out the bilges and was left 4 or 5 inches or so.

Q. How many hours before the ship sailed was it that you say that they pumped the bilges out?

A. Four hours before.

[fol. 230] Q. Then when the steamer sailed 4 hours after the pumping you took soundings again, did you not?

A. I never let up, I always take every 4 hours.

Q. I am asking you now about a specific instance, and please tell me whether or not you took soundings 4 hours after the pumping had been completed and at the time of the raising of the anchor?

A. Yes, sir.

Q. You have testified here this morning that on that occasion when you took those soundings at the time of the raising of the anchor, that the greatest depth of liquid you found in the bilges was 5 inches; is that not so?

A. 5 inches, because they had bailed it out.

Q. That is, they had bailed it out in accordance with the way and at the time you have told us about here a few minutes ago, is that correct?

A. I don't understand the question.

Q. (Question read.)

A. Yes, sir.

Q. Do you always report to the mate or the officer in charge on watch what your soundings are every 4 hours?

A. Yes, sir.

Q. You report to him what they are, whether it is 2 inches or 10 inches or anything else, is that correct?

A. Yes, sir.

Q. Did you not testify the last time on your deposition here in this office that on this ship you rarely ever had a sounding greater than 2 or 3 inches in any of the bilges, and that when you only found 2 or 3 inches, that you made no note of it nor did you report it to the officer of the watch?

A. 3 or 4 inches I call nothing.

[fol. 231] Q. And you do not report 3 or 4 inches to the mate, do you, and to the officer on watch?

A. 4 inches up I do.

Q. Anything under 4 inches you do not?

A. Because the pump cannot bail it out.

Q. On this trip you had to report to the officer on deck the soundings every 4 hours for the full 16 days?

A. Yes, sir.

Q. Sometimes you are able to tell, are you not, from looking at the rod, just what that liquid is that is in the bilge?

A. Yes, sir.

Q. On this voyage, though, you felt obliged to taste it to ascertain what was in that bilge, did you not?

A. Yes, sir.

Q. You could not tell what it was by looking at it?

A. I was doubtful, it was the best way to be certain.

Q. Could you tell by smelling of it?

A. Also, but not as well.

Q. And in this instance it was so doubtful as to what the liquid was in that bilge that you found it necessary to taste of it six times a day for 16 days, to tell what was in there, that is true, is it not?

A. Every day, in order not to be doubtful.

Q. And six times each day?

A. Every 4 hours.

Q. After you tasted it the first time and found out to your satisfaction, at least that there was olive brine in the bilges, did not that satisfy you enough without putting you to the necessity of tasting it six times every day for 16 days?

A. I might have left some day out, but nearly always tasted it to make sure that it was brine.

[fol. 232] Q. Did you take this sounding rod to the officer of the watch in charge there the first time you discovered that there was an abnormal rise of liquid in the bilges on that trip?

A. Yes, sir.

Q. Did you show him the rod?

A. Yes, sir.

Q. What did he say?

A. Same as I did, that it was brine.

Q. Did he smell that rod?

A. Yes, sir.

Q. Did he taste it?

A. No, sir, the smell of it was enough.

Q. The smell was enough for the officer?

A. Yes, sir.

Q. It was not enough for you?

A. I have got to have smell and taste in order to satisfy myself.

Q. Did the officer smell that every time you took it to him throughout that voyage?

A. Sometimes I did not bring it up, but the majority of the cases I did bring it up to the officer on watch.

Q. What was the condition in those cases that led you to take it up to the officer sometimes and not others?

A. Because we were in accordance that there was brine.

Q. Did you testify the last time that you were examined that the officer on watch tasted that rod every time you brought it to him, as well as you did?

A. No, sir.

Q. You are now swearing that you did not testify on your last deposition that you did not say that the chief officer tasted that rod every time you brought it to him?

A. The first time I brought it up to him he smelled it and [fol. 233] tasted it, but the rest of the times he smelled it only.

Q. Did you at any time taste the brine in these casks direct?

A. Not directly from the casks, only through the sounding rod

Q. You always tasted it after it had gone through a filtering process passing through the bilge, is that right?

A. Yes, sir.

Q. I understand you to say that the brine was running out of these casks when they were being taken over the side at Cadiz?

A. Yes, sir.

Q. Did you ever know olives to come to this country in casks preserved in olive oil rather than in brine?

A. Always in brine.

Q. You never bring them from Cadiz in oil?

A. I don't know, because I don't look at the inside of the packages.

Q. So far as you know the liquid contained in these casks may have been oil instead of brine on this particular trip?

A. This I know to be brine.

Q. Did you sample yourself directly out of those casks any of the liquid in the casks?

A. Only on the sounding rod.

Q. How do you personally know what was in the casks?

A. As the casks were being taken out the liquid that came out dropped on the deck, was the same kind of liquid as that which came out on the sounding rod.

Q. After all this examination here the other day and today, you have not said anything about having sampled that liquid that [fol. 234] dropped out on deck, have you?

A. Well, I tasted it, was the one that came on the sounding rod.

Q. But you do not know what it was when it came on deck, do you—your own personal knowledge?

A. Yes, sir, I do know.

Q. Did you taste that liquid that came on the deck?

A. Not the one that came on deck.

Q. How do you personally know what was in the barrels?

A. Because the same smell of the liquid that came out of the barrels was the smell that came out from the bilges.

Q. Did you smell that liquid that came out of the barrels on the deck?

A. Yes, sir, it had a very strong smell.

Q. Is that part of your duty to smell that liquid that comes on deck that way?

A. It is my own curiosity which I believe comes in handy.

Q. And you feel it came in very handy in this case, do you not?

A. Precisely.

Q. Were these leaking barrels that you saw coming on deck at Cadiz put in all the holds, Nos. 1, 2, 3 and 4?

A. Those that I saw went into the No. 1 and No. 3 holds.

Q. And there were no leaky barrels put in Nos. 2 and 4?

A. Very little, because I did not see very much in the sounding.

Q. Your only reason for saying that is by what you found in the sounding, is not that true?

A. Yes, sir.

Q. Did you see any of the hoops come off those barrels as they were being taken on board at Cadiz?

A. Yes, sir.

[fol. 235] Q. How did they come off; did they break off or did they fall off the end of the barrel?

A. Broken.

Q. They broke off?

A. Yes, sir.

Q. Did any of the hoops on the extreme ends of the barrels around the heads come off or break off at that time?

A. They came out from the ends the same as from the center, because they were in such bad condition.

Q. The hoops came off from all over the barrels, is that correct?

A. Yes, sir.

Q. Any of the heads come out?

A. No, sir.

Q. No heads came out of those casks when you were putting them on at Cadiz?

A. I did not see any.

Q. What did you make this record of your soundings on?

A. I don't understand.

Q. Did you make it in a book or on a piece of paper, or what?

A. On paper.

Q. What do you keep that paper record for?

A. So as to know how the bilges had been from day to day.

Q. As a result of the record you kept and from your observation of what was on the sounding rod, you believed there was a lot of brine in those bilges every day, did you not?

A. Yes, sir.

Q. Did you not think there would be any trouble about those when this shipment got to New York after what you had tasted there and what you had seen coming on board, and so on?

A. I do not know anything about those things.

Q. Did you not have any surmise whatever that there would be [fol. 236] some trouble about this shipment after what you saw concerning it when it was taken on board and after the rise of bilge on the voyage?

A. I believe I thought at the time that owing to the bad condition there might be some.

Q. Some trouble about it, and while you said a moment ago that you were clever enough to note the nature of this liquid coming out of the barrels when you came on board, out of curiosity, or to help you later on with your soundings, yet you overlooked the fact that it might be very important for you to preserve the record of what you found there, did you not?

A. With these records we did the same as on the previous voyages, take them off the file and tear them up, throw them out.

Q. What file?

A. In a wall file in the steering room, pilot room.

Q. In the navigating room?

A. Yes, sir.

Q. Does that record make a note of just what the nature of the liquid is that you find in the bilge?

A. I sometimes put down the kind of liquid that there is in the bilges.

Q. Did you put down on this paper a report of this on this voyage, what the liquid was that you found in the bilge?

A. I declared before that I put down the kind of liquid that is

found in the bilges. What I do put down is the amount, what liquid that is found in the bilges, and the kind I say verbally.

Q. These bilges were pumped every 4 hours on this voyage were they not?

A. Some, yes; others not, because all of them do not have the same amount of liquid.

[fol. 237] Q. But on every watch on this voyage some bilge or other was pumped, was it not?

A. Yes, sir.

Q. And these two bilges, Nos. 1 and 3, were pumped every 4 hours on the voyage?

A. Yes, sir.

Q. Are you familiar with the size of the bilge in each of those holds?

A. The height is 24 inches.

Q. What is the width?

A. About 30 inches, some of them over, a curve to them.

Q. You expected to find brine in these holds Nos. 1 and 3 on this voyage, did you not?

A. Yes, sir, seeing that the conditions in which the casks were loaded.

Redirect examination by Mr. Crandall:

Q. On cross examination you said that you put the sounding rod down the pipe to see what liquid there was in the holds; did you mean holds or bilges?

A. Bilges.

Q. You meant bilges when you said holds?

A. Yes, sir.

Q. On cross examination, when asked about the depth of the liquid in the bilges, you replied 15, 16, 17; I suppose you meant inches, did you not?

A. Yes, sir.

Q. Were there 15 or 16 inches in Nos. 2 and 4 bilges?

A. No, sir, there was less.

Q. Do you recollect approximately the greatest depth of liquid you got in Nos. 2. and 4 bilges?

A. About 7 or 8 inches.

[fol. 238] Q. Did you see the casks being loaded into the No. 2 and No. 4 holds at Cadiz?

A. Yes, sir.

Q. I thought you only saw them in the No. 1 and No. 3 at Cadiz?

Mr. O'Neill: I object to it on the ground it is cross examination of his own witness.

A. In all four holds.

Q. Did you notice whether any of the hoops at the very end of the casks came off?

A. Yes, sir.

Q. After the bilges would be pumped out would you take the sounds 4 hours afterwards?

A. Yes, sir.

Q. How low could you reduce the depth of the liquid in the bilges by pumping?

A. About 4 inches.

Q. Do you mean to a depth of 4 inches?

A. Yes, sir.

Q. After you had reduced the liquid to a depth of 4 inches would you find 16 inches in that bilge 4 hours afterwards?

A. Not always 16 inches, 10, 12, 8, 10, 11.

Q. Take, for instance, the bilges in No. 3 lower hold; if you pump them out how long after pumping them out would it be before you would find 16 inches in them?

A. Sometimes 8 hours it has 16 inches.

Q. Did you ever get 16 inches in 4 hours?

A. No, not 16 inches.

[fol. 239] Q. Do you recall how many of these casks you saw the hoops at the extremity coming off from?

A. I do not know the number.

Recross-examination by Mr. O'Neill:

Q. How many hours' watch are you on and off?

A. Every four hours the night watchman would call me and if I should happen to go to sleep during the day time the quartermaster would call me.

Q. So that you had to be up every 4 hours throughout the entire trip, is that correct?

A. Yes, sir.

Q. Which hoop is it that holds the head in these casks, the end hoop or some of the others?

A. The two end hoops.

Q. Did you ever see the two end hoops coming off the end of the barrels coming aboard this ship at Cadiz?

A. I have not seen the two of them, but I have seen one of them.

Q. You do not remember whether you saw two or not, do you?

A. I saw one of them; I do not remember seeing two of them, but they must have come off during the trip, because they were in such bad condition.

Q. You do not know when they came off if you did not see them come off, do you?

A. I saw them off at Cadiz.

Q. You saw the hoops coming off at Cadiz?

A. Yes, sir.

Q. Over how many years have you been sampling the contents of the bilges of ships you have been on?

A. I don't know we sampled the contents of the bilges, for some-[fol. 240] times we had dry cargo such as onions, and the liquid that is in the bilges is clear water then.

Q. Over how many years on and off have you been testing these beverages that you say you found in the bilges?

A. One year.
Q. Only one year?
A. A year or a month more or a month less. I do not know exactly.
Q. When did that year begin and end?
A. 1916.

ANTONIO OLIVEROS, being duly sworn, testified as follows on behalf of the claimant, through interpreter:

By Mr. Crandall:

Q. What is your name?
A. Antonio Oliveros.
Q. Are you the chief engineer of the Isla de Panay?
A. Yes, sir.
Q. How long have you been the chief engineer on this ship?
A. 13 months.
Q. How long have you been employed by the Spanish Line?
A. 29 years.
Q. How long have you been navigating?
A. 29 years.
Q. How long have you had a chief engineer's certificate?
A. 12.
Q. Were you chief engineer of the Isla de Panay on the trip of this ship terminating at New York in November, 1917?
A. Yes, sir.
[fol. 241] Q. How many bilges has this steamer got?
A. 12.
Q. How were they situated?
A. Two in each hold, two in the engine room and two in the boiler room.
Q. They were located on the port and starboard side of the hold, were they?
A. One on the starboard and one to port.
Q. What was the depth of the bilges at the deepest point?
A. 24 inches.
Q. 24 Spanish inches?
A. Yes, sir.
Q. And they curve around with the skin of the ship at the outside, do they?
A. Yes, sir.
Q. And were straight up and down next to the tanks?
A. And very, very small angle next to the tank.
Q. But the inclination was vertical on the inside of the bilges next to the tanks?
A. Yes, sir.
Q. Were the bilges cleaned out at Barcelona before the cargo was taken on board of the ship?
A. Very well cleaned and whitewashed.

Q. Were the floors of the holds absolutely level or did they slope from the center to the skin of the ship?
A. A small angle towards the skin of the ship.
Q. What did you have over the bilges?
A. Wood.
Q. Wooden boards?
A. Wooden boards.
Q. About how many wooden boards, do you recollect?
A. About four.
Q. How did any liquid which might be in the lower holds get into the bilges?
A. Because there is a space between the boards.
[fol. 242] Q. How much of a space is there between the limber boards?
A. About a quarter of an inch.
Q. How many bilge pumps did you have?
A. Four, two attached to the engine and two auxiliaries
Q. Did you have a bilge pipe running into each bilge?
A. Yes, sir.
Q. Into what did that pipe run in the bilge?
A. In a mud box there is in the bilge.
Q. How did you keep the mud from getting into that pipe?
A. That mud box is perforated on the side.
Q. And then the bilge pipe runs into the engine room, does it?
A. Yes, sir.
Q. Into what does it lead in the engine room?
A. In the valve box.
Q. At the after end of the engine room or the forward end?
A. Nos. 1 and 2 and boilers into the forward end, and No. 3, 4 and engine room into the after end.
Q. And there is a bilge pipe running from each bilge to these valve boxes in the engine room?
A. Yes, sir.
Q. How does the liquid get from the valve box into the bilge pump pump?
A. There is a pipe between the valve box and the pump.
Q. Was there an atmospheric valve on these engine pumps in the engine room?
A. Each pump has a valve.
Q. Can you tell from the valve the nature of the liquid passing through the pump?
A. Yes, sir.
[fol. 243] Q. How can you tell it?
A. By the feeling of it and the smell of it.
Q. Is there a little faucet attached to the valve?
A. You loosen a little screw on top of that valve and it permits the liquid to come out.
Q. To drop out?
A. Drop out.
Q. How can you tell from what bilge any liquid is coming?
A. According to the valve which is open.

Q. You have a valve for each bilge?
A. Yes, sir.
Q. Before the ship left Barcelona did you make an inspection of the bilge pumps?
A. Yes, sir.
Q. Did you inspect them at Cadiz also?
A. In all the ports.
Q. What can you state as to their working condition before you left for New York?
A. That they were in perfect state.
Q. Did you inspect the engine and boilers before leaving Cadiz for New York?
A. Yes, sir.
Q. What can you state as to their condition?
A. That they were in perfect state.
Q. How were the holds divided?
A. By iron bulkheads.
Q. Did the iron bulkheads run from the floor of the hold up to the weather deck?
A. Yes, sir.
Q. Where were your fresh water tanks located?
A. In No. 1 hold.
Q. Are those the only fresh water tanks you had?
A. For drinking those.
[fol. 244] Q. Did you inspect those tanks before you left Cadiz?
A. Yes, sir.
Q. What can you state as to their soundness and tightness then?
A. They were hermetically sealed.
Q. Were the ballast tanks all sound and tight before leaving Cadiz?
A. Yes, sir.
Q. Of what material was the upper deck made?
A. Iron plates covered with wood.
Q. And the tween decks the same?
A. Yes, sir.
Q. How many hatchways did the ship have?
A. Four.
Q. Were the coamings of these hatchways made of steel?
A. Yes, sir.
Q. How were the hatches covered?
A. With wooden hatch covers, covered with tarpaulin iron battens wedged in.
Q. You mean the tarpaulins were drawn down over the coaming of the hatch and wedged in with iron battens on the sides?
A. Yes, sir.
Q. How often did you pump out your bilges on this trip?
A. Ordinarily every four hours.
Q. Did you get any liquid out of the bilges on this trip except water?
A. We took brine out, but brine is water.
Q. What kind of brine was this?

A. Water mixed with salt, which is contained in olives.
Q. What bilges did this brine come from?
A. From No. 1 and No. 3.
Q. Did you get any from No. 2 and No. 4?
A. Very little.
Q. How could you tell that olive brine was coming from No. 1 and No. 3 bilges?
A. By the smell and by the feeling of it.
[fol. 245] Q. How did it smell?
A. Smelled very salty.
Q. Had you ever smelled olive brine previous to this trip?
A. Yes, sir, a good many trips.
Q. And you recognized this as olive brine?
A. Yes, sir.
Q. How did it feel?
A. It is a feeling which prevents the two skins of the fingers from coming together, from rubbing.
Q. You mean it was a gritty feeling?
A. Yes, sir.
Q. Did you let any of this brine drop on to your hand from this little faucet attached to the valve?
A. Yes, sir.
Q. What did you do with it after it got on your hands?
A. I smelled it and when I am doubtful of what the contents are I taste it.
Q. Were you obliged to taste it on this trip?
A. Yes, sir, to make sure that it was brine.
Q. How did you taste it?
A. By dipping the point of the tongue into the palm of the hand.
Q. What is the difference in the smell between ordinary bilge water and olive brine?
A. The brine is biting.
Q. Is the bilge water biting?
A. No, sir it only has a bad smell, but not biting.
Q. What part of the bilge was the mud box located in?
A. On the aft end.
Q. How often were the engines and boilers inspected on this trip?
A. Every day I inspected.
Q. Was there any mishap to the engines or boilers during the trip?
A. No, sir.
Q. When was the Isla de Panay last on the drydock?
A. In May.
[fol. 246] What were the reasons for her going on drydock?
A. By reason of a fire.
Q. Was Lloyds certificate issued after the vessel came off of the dock?
A. Yes, sir.
Q. The captain knows about those certificates, does he?

A. Yes, sir.

Q. Were the repairs to the ship made under the direction of the Lloyds Inspector?

Mr. O'Neill: I object to all this as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. She had some coal on at Barcelona, did she not?

A. Yes, sir.

Q. You do not recollect how many tons she had on board?

A. Exactly I cannot remember.

Q. Approximately.

A. About 300 tons.

Q. This coal at Barcelona was in the bunkers?

Mr. O'Neill: Objected to as leading.

A. Yes, sir.

Q. What were the tank tops covered with?

A. With its own top and screws hermetically sealed.

Q. Did you have any covering over the top of the tanks?

A. Wood.

Q. What covering, if any, did you have over your shaft tunnel?

A. Wood.

Q. What is the greatest depth of liquid you found in your bilges on the trip in question?

A. About 16 or 17 inches.

Q. Spanish inches?

A. Yes, sir.

[fol. 247] What is the ordinary depth of liquid you get in your bilges?

A. From 3 to 4 inches that the pump can bail out.

Q. I show you Lloyd's Certificate, Respondent's Exhibit 6, and call your attention to certain recommendations as to repairs thereon, please read it.

Mr. O'Neill: I object to all this on the ground that it is irrelevant, incompetent and immaterial.

Q. Were those repairs all made before you came aboard the Isla de Panay?

A. Yes, sir.

New York, March 14, 1918.

ANTONIO OLIVEROS, recalled, testified as follows through interpreter:

By Mr. Crandall:

Q. Can you state whether or not the plates of the steamer were all tight before she left Cadiz?

Mr. O'Neill: I object on the ground it is not shown that he made any inspection so as to know this.

A. Yes, sir.

[fol. 248] Cross-examination by Mr. O'Neill:

Q. What was this atmospheric valve installed in your ship for?

A. When the pumps come from the manufacturer they already had these valves attached to them and it is to know whether the pump is pumping water or not.

Q. These valves as they have been referred to here have faucets or caps on so that you can sample from time to time the contents of the bilge, is that correct?

A. Yes, sir.

Q. Are they faucets or what are they?

A. Yes, sir, a faucet with a screw on the top to tighten it or loosen it.

Q. Did you ever have any wine in those bilges on any occasion?

A. No, sir.

Q. You never did find wine in the bilge on any trip?

A. Sometimes there is a little bit, but it mixed into the water; there is never any great damage to the wine barrels.

Q. But you have found wine in the bilge through these sampling taps that you spoke about?

A. Mixed with water.

Q. I suppose when you found wine in the bilges you have always called your entire crew to quarters, is that it?

A. No, sir, each one in his own place.

Q. Did you work your pumps every 4 hours on this trip?

A. Yes, sir.

Q. Did you draw water through them, each of those 4-hour attempts?

A. The first time, yes, but after that nothing.

[fol. 249] Q. Have you any means of knowing what the depth of the water is in the bilges from your engine room space?

A. Without the report, no.

Q. That is, you have no instrument in the engine room that indicates to you what the depth of liquid is in the different bilges, is that correct?

A. No, sir.

Q. All you know about it is that you received a report from somebody else on the ship and if they report that there is enough depth of liquid in the bilges that the pumps can reach, you pump until it gets down below the reach of the pump pipes, the suction pipes?

A. Yes, sir.

Q. Are you positive that you know olive brine when you taste it and smell it?

A. Yes, sir.

Q. How often have you tasted it or smelled it on this particular ship previous to this voyage that we are talking about here?

A. In this ship, never before.

Q. How long were you on this ship?
A. 13 months.
Q. And during the 13 months did you carry a lot of olives?
A. I did not take any notice of it until this trip.
Q. Did you keep any sort of a wine list or beverage card there in the engine room that you scored down the different results of your drawings through these taps from the bilge?
A. No, sir.
Q. For how long a time—that is, in years—on and off have you been sampling the contents of your bilges on ships?
A. Since I started to navigate.
[fol. 250] Q. And how long was that?
A. 29 years.
Q. During all that time have you ever found olive brine in the bilge of any ship you have been on?
A. I don't remember.
Q. You would have remembered if it had happened?
A. Yes, sir; I don't remember.
Q. What did you usually get on every ordinary average voyage as a result of your sampling from these taps leading into the bilges?
A. We do not always taste it; we taste of it when we are in doubt; as a rule it is water that comes out.
Q. What kind of water is it that comes out ordinarily?
A. The sweat from the sides of the ship.
Q. Is this a passenger steamer?
A. Yes, sir.
Q. Did she have passengers on this voyage?
A. Coming in we never bring passengers.
Q. That is, coming toward New York you do not bring passengers?
A. No.
Q. Everything in the inside of the holds of this vessel is under decks; that is, every bit of liquid that comes on board your vessel or that is on board your vessel, except that which is carried off in scuppers or other pipes or through the sea valves every other liquid drains into those bilges, does it not?
A. Yes, sir.
Q. If you have bad onions on board or bad garlic and there is any sweat from them, whatever vapor may arise from them and settle on the skin of the ship, that vapor or juice from the onions and garlic all drains down into the bilges, does it not?
A. Yes, sir.
[fol. 251] Q. Any liquid of any kind that once appears in those holds is bound to drain into those bilges regardless of where that liquid comes from, that is true, is it not?
A. Yes, sir.
Q. Do you know of any fouler liquid on the face of the earth than bilge water?
A. No, sir.
Q. What hold was this coal in that you have spoken about?
A. No. 2.

Q. Is that coal usually wet when you put it on board?
A. No, sir.
Q. Is it perfectly dry? Is it not always damp?
A. It is no dampness.
Q. It has some dampness of its own?
A. Yes, sir.
Q. And some of that also drains into the bilge, does it not?
A. Yes, sir.
Q. That would add at least a little coloring matter to this beverage that you were enjoying, would it not?
A. Make it black; I don't drink that.
Q. You saw the condition of these casks when they were taken on at Cadiz, did you?
A. No, sir.
Q. Do you know how they were loaded, by the steamer's winches or how?
A. All of that is always loaded with the ship's winches.
Q. And it was done so in this case?
A. Yes, sir.
Q. And it was unloaded with the ship's winches at New York?
A. Yes, sir.
Q. Is your carpenter a general handy man about the ship?
A. Always very busy.
Q. He is able to make some minor repairs around there to packages or cases, is he not, if they are broken?
A. Yes, sir.
[fol. 252] Q. Do you suppose that he is competent to put a hoop on a cask or anything of that sort?
A. Provisional, yes.
Q. That is, he could put it on temporarily, for the time being?
A. Yes, sir.

Redirect-examination by Mr. Crandall:

Q. It would not have been possible for him to go into the hold to put any hoops on, would it?
A. No, because whenever that is done it is done on the deck.
Q. If he had coopered all of the casks with the hoops broken or off, how long do you think the ship would have remained at Cadiz?
A. At least two days.
Q. Did you have any extra supply of hoops on board?
A. No, sir.
Q. When did you first go on the Isla de Panay?
A. In January of 1917.

At Mr. Crandall's request the following questions and answers were read to the witness:

"Q. Did you work your pumps every 4 hours on this trip?
"A. Yes, sir.

"Q. Did you draw water through them, each of those 4-hour attempts?

"A. The first time, yes, but after that nothing."

Q. Will you explain that a little more fully?

A. With the rolling and pitching of the ship naturally the water goes fore and aft and sideways and sometimes you draw a great [fol. 253] deal of water and other times you draw very little or almost nothing.

Q. You pumped each bilge every 4 hours, did you?

A. Always pump whether there is any water or not in.

Q. Did you always get liquid from the bilges in No. 1 and 3 when you pumped every 4 hours on this trip?

A. Yes, sir, small quantities.

Recross-examination by Mr. O'Neill:

Q. When the ship reached New York did you commence discharging right away or was there a little delay after you reached the dock?

A. Immediately.

Q. First you discharged the cargo in the tween decks and finally you got down to the space where the casks of olives were, did you not?

A. Yes, they always take the top first and then in order to get at the bottom.

Q. How many days were you unloading at New York before you commenced to take out these casks of olives?

A. Two days at the most.

Q. Do you know if anyone on your ship notified the agents of your line here in New York of the condition that these casks were in as you understood them to be in when they came on board at Cadiz?

A. No, because that is something of the captain's?

[fol. 254] New York, March 22, 1918.

ARTURO MUSLERA, recalled, testified as follows through the interpreter:

Re-direct examination by Mr. Crandall:

Q. Captain, when through bills of lading for the United States are issued by the Spanish Line at Seville, what is done with the ship's copies?

A. The captain signs them, and I don't know any more about them.

Q. What captain signs them?

A. The captain of the ship that transports the cargo from Seville to Cadiz.

Q. What is done with the shipper's copies, captain?

A. I don't know.

Q. When the Isla de Panay arrived at Cadiz what bills of lading did you have to sign at the office at Cadiz?

A. I signed a stack this high (illustrating) of all the cargo I had taken on board.

Q. What cargo?

A. All the cargo that the ship took.

Q. The cargo from Seville?

A. As I did not look at each bill of lading I do not know whether I signed any or not.

Q. When the captain of the Mogador signs bills of lading at Seville is it customary for you to sign them again at Cadiz?

A. No, sir.

[fol. 255] Q. Well, what bills of lading did you sign then, captain?

A. Of the freight that I take at Cadiz.

Q. You mean the freight that you take direct at Cadiz?

A. Yes, sir.

Q. Do you sign bills of lading at Cadiz before the cargo is taken aboard the ship?

Mr. O'Neill: I object to that as leading.

A. Yes, sir.

Q. Why is this, captain?

Mr. O'Neill: I object to that on the ground it is incompetent, irrelevant and immaterial.

A. In order that they may clear at the American Consul, to present the full manifests, also that the bills of lading might get to the possession of the shippers before the sailing of the steamer, and in order to send the signed copy of the shippers with the steamer.

Q. What is done with the bills of lading that are issued at Seville?

A. I do not know.

Q. Do you deliver any copies to the shippers there?

Mr. O'Neill: I object to that on the ground he says he does not know.

A. As captain of the Isla de Panay I do not know.

[fol. 725] Q. Do you know as captain of the Mogador?

Mr. O'Neill: I object to that. He is not captain of the Mogador, he is captain of the Isla de Panay.

A. I suppose that they give them to the shippers and to the company.

Mr. O'Neill: I move to strike out the answer on the ground it is merely the captain's supposition.

Q. Are you familiar with the Spanish steamship Mogador?

A. I know it.

Q. Did you used to be captain of that ship?

A. Yes, I was a good many years ago.
Q. How long is this ship?
A. 48 metres.
Q. Of what material is she constructed?
A. Iron.
Q. How much freight does she carry?
A. 400 tons.
Q. How many holds has she?
A. Two.
Q. One forward of the engine room and one aft of the engine room I suppose?
A. Yes, sir.
Q. Has she any tween decks.
A. One. She has got one at the forward end and one at the after end.
Q. Are these tween decks often in use?
A. Yes, sir.
Q. Are they permanently built into the steamer?
A. They are removable.
[fol. 257] Q. I suppose they were iron bulkheads between holds Nos. 1 and 2 and the engine room, were they not?
A. Yes, sir.
Q. Were these olives brought down from Seville to Cadiz on a river?

Mr. O'Neill: I object to that on the ground that it is not within the personal knowledge of this witness.

A. Yes, sir.
Q. What is the name of this river?
A. Guadalquivir.
Q. What is the distance from Seville to Cadiz on this river, approximately?
A. About 70 to 80 miles.
Q. Did you use to run on the Mogador between Seville and Cadiz?
A. Yes, sir.
Q. Did you carry olives between Seville and Cadiz?
A. Yes, sir.
Q. How is the cargo taken aboard the Mogador at Seville?

Mr O'Neill: I object to that on the ground that it does not throw any light on how it was taken aboard in this particular instance.

A. From the dock. The Mogador docks or ties up to a dock and they take the cargo from the dock.
Q. Did they ever load cargo on to the Mogador from Seville on lighters?
A. No, sir.
[fol. 258] Q. How many hatchways has the Mogador?
A. Two.
Q. Of what material are her decks constructed, captain?
A. Iron, wood on top.
Q. How many voyages does the Mogador make a month between Seville and Cadiz?

Mr. O'Neill: I object to that on the ground that it does not appear to be within the knowledge of the witness.

A. Three.

Re-recross-examination by Mr. O'Neill:

Q. The shipment of olives in this case was received by the Spanish Line as owners of the Isla de Panay at Seville; is that correct?

A. Yes, sir.

Q. Through the agency of the captain of the Mogador?

A. Yes, sir.

Q. And when the captain of the Mogador received a cargo at Seville for through shipment by the Spanish Line as owners of the Isla de Panay to New York he signed naturally the bill of lading?

A. Yes, sir.

Q. And that is what happened in this case?

A. Yes. But sometimes they give letters of guarantee.

Q. But in this case he did receive the cargo for the Spanish Line at Seville?

A. Yes, sir.

Q. And he turned it over to the Isla de Panay through lighters owned by the Spanish Line at Cadiz?

A. Yes, sir.

[fol. 259] Q. When you testify concerning the manner in which the cargo is received at Seville and how it is brought down the river, and so on, you are basing that testimony on what was done when you were in command of the Mogador between Seville and Cadiz; is that correct?

A. Yes, sir.

Q. And you assume that it was done the same way in this particular shipment, although you did not see it yourself?

A. Yes, sir, with the alterations that the captain of the Mogador might be able to make, because the captain of the Mogador might have refused to take on any shipment and put a note on the bill of lading, and the shipper refused to accept the bill of lading and give a letter of guarantee in its place.

Mr. O'Neill: I move to strike out all of the testimony of this witness concerning the handling of the cargo on board the Mogador in this particular instance on the ground that it is based on his assumption that the same course of handling took place as was the custom when he was in command of the Mogador himself, and not based on what he personally saw concerning the handling of this shipment at Seville and between Seville and Cadiz.

Q. The captain of the Mogador reserved the right to reject the cargo or make any notations on the bill of lading, of couse, in the regular way?

A. Yes, sir.

[fol. 260] Q. The same as the captain of any ship in any port in the world or under any flag reserves?

A. The same, or demanding a letter of guarantee for the condition in which the goods are received on board.

Q. And he relies upon, to a considerable extent, the condition in which the shipment appears to him at the time he takes it, as he sees it there on the wharf or coming on board his vessel?

A. I believe yes. Yes. I cannot interpret the ideas of the captain.

Q. You rely entirely when the shipment comes to you on the form of the documents handed to you at Cadiz—relying upon the documents that the Mogador turned over to you at Cadiz?

A. According as I have sometimes put notations on the shipping orders at Cadiz.

Q. But so far as the shipment at Seville is concerned, you rely upon the form and shape that the documents are in as handed to you at Cadiz?

A. I accept the bill of lading, but that does not state that I accept it in good condition, as I might make a notation on the shipping orders which are presented to me together with the cargo.

Q. Have you ever received cargo at Seville direct on any other ship during your career as an officer of this Line?

A. Yes, sir.

Q. And at the point of original shipment you would always reserve your right to make your notations on the bill of lading in the first instance?

A. Yes, sir, reserve the right not only to put the notations on the [fol. 261] bill of lading but also on the shipping order if it is necessary, supposing that the bill of lading is not presented to me.

Q. But if at Seville the bill of lading was presented to you as captain of the Mogador for you to sign, you would not put your signature on there until you saw the condition of the cargo and make your notations in the usual way concerning same?

A. I would not put my signature to it.

Q. Unless you made your proper notations as to the condition?

A. The bills of lading from Seville are never presented to me.

Q. But if you were in command at Seville and they were presented to you there then you would take care to see that you made your proper notations?

A. I would not be under obligations to put any note on the bill of lading in this case where there are letters of guarantee responding for my responsibility for the freight.

Q. But if a bill of lading is presented to you at Seville and the consignment is in bad shape and you can see it is in bad condition, as captain of a vessel, a licensed officer in command of the ship, you reserve the right to make your notations against this bad condition that maintains there, assuming that you were there in command?

A. If a letter of guarantee is given me relieving me on the ship of all responsibility, as was done in this case, no notation will be put on the bill of lading, but if there is no letter of guarantee given, [fol. 262] then a notation will be put on the bill of lading.

Q. In this case was any letter of guarantee given to you at Cadiz?

A. In this case, no, because the bills of lading were through from Seville, but I did put a note on the shipping orders which I received at Seville that the packages in which the olives were contained were in very bad shape.

Q. But of your own personal knowledge you do not know anything about having seen or had in your command any letters of guarantee at Seville, do you?

A. No, but I have knowledge that they have given them.

Q. Did you see them delivered by the owners to the captain of the Mogador, or is it that someone told you about this?

A. Somebody has told me.

Mr. O'Neill: I move to strike out the testimony of the witness concerning these letters of guarantee on the ground that it is purely hearsay.

Re-redirect examination by Mr. Crandall:

Q. Captain, why are these letters of guarantee given in Seville?

Mr. O'Neill: Objected to on the ground it is incompetent, irrelevant and immaterial.

[fol. 263] A. If the bills of lading are issued with a note on them the insurance companies or the bankers in Spain will not accept that bill of lading on account of the condition in which the goods are, but if they have no clause on it they will pass it to a banking house and the insurance company that they have been shipped by the shipper in apparent good order and condition, although they have issued a letter of guarantee relieving the company of any responsibility whatsoever for the condition of the packages.

Q. I show you three letters and ask you to look at those three letters and tell me what they are? (Handing to witness.)

Mr. O'Neill: I object on the ground that the letters speak for themselves. Note that the witness reads the letters.

A. As far as I know I have not had any experience examining them, but I am an expert, or whether the package or containers are sufficient or not.

Mr. O'Neill: Note that the witness continues reading the letters to the interpreter.

Q. I ask you what the papers are?

Mr. O'Neill: I object to the question, asking him what they are, on the ground that the papers will speak for themselves.

[fol. 264] A. They are letters of guarantee, relieving the company of all responsibility for the conditions in which the packages are received at destination.

Mr. O'Neill: I move to strike out the answer on the ground that there is nothing to show that this witness can identify the genuineness of the signatures or the originality of these papers in any respect, that it is merely an instance where some papers were handed to him, and he has read them, and after reading them he attempts to state what they are, whereas they speak for themselves.

The Witness: They are letters of guarantee so that the boat has no responsibility for the deficient state in which the packages have been shipped.

Mr. O'Neill: I move to strike this all out on the ground that the witness has no personal knowledge of the matters concerning which he is testifying, and on the further ground that this is not a competent way in which to prove any of these papers shown to the witness.

Q. Will you look at these letters and state to me what merchandise they refer —?

Mr. O'Neill: Same objection, on the ground that these letters speak for themselves, for what they are worth.

[fol. 265] A. One for 146 casks E. S. C., that the damage occasioned by insufficient containers, relieve the company of all responsibility caused by the insufficient package of same. The next one with reference to 227 casks of olives, and that we are sending by the steamship Isla de Panay to New York. We understand that said company considers the containers insufficient and that it does not accept responsibility for the damages caused by the natural causes of the voyage, and for guarantee of said company we sign the above, with the corresponding signature. Next, in order to relieve said company of any responsibility which might be caused, that there are 27 casks shipped on the Mogador, to be transhipped to the steamship Isla de Panay in Cadiz, with a destination of New York, as long as no note has been put on the bills of lading, signed by the corresponding shipper.

Q. When you speak of 27 casks, are those 27 casks referred to in the third letter?

A. To the third letter, yes.

Q. By whom are these letters signed, captain?

Mr. O'Neill: I object to that on the ground that it does not appear that the witness knows anything about the proper signatures on these papers or who signed them, and that he did not see them signed himself.

A. I do not know the signatures, but the letters are signed, if not [fol. 266] by the shipper, by somebody in authority over them. If not the shipper somebody that is equal to the shipper.

Mr. O'Neill: You mean a representative of the shipper, don't you?

Q. Do you mean somebody representing the shipper, captain?

A. The shipper—I don't know the name—that they are made

out by the shipper, otherwise the agency would not accept them, the Seville agency would not accept them otherwise.

Mr. Crandall: I ask that these letters be marked for identification.

Marked Claimant's Exhibits 13, 14 and 15 for identification.

Mr. O'Neill: I move to strike out the latter part of the answer on the ground that it is merely a conclusion of the witness.

Re-recross-examination by Mr. O'Neill:

Q. When for the first time did you ever see those papers, those letters that have just been shown to you here?

A. Here in New York.

Q. How long ago?

A. A good many days. I do not remember how long ago.

Q. Do you personally recognize the signatures on those letters?

A. I do not know the shippers. I cannot say exactly. As long as they are here I believe that they are the correct signatures.

[fol. 267] Q. But of your own knowledge you cannot identify the writing of those shippers, can you?

A. I am not a merchant, I cannot say.

Q. And you do not know those signatures, whether they are the handwriting of the shippers or whose they are, do you?

A. Absolutely certainly, I cannot say, but I believe yes.

Q. You assume that because they are handed to you by the counsel here they are genuine, is that it?

A. Because they have come from Spain direct to this agency.

Q. But do you know the handwriting on those papers as being the original genuine signatures of the shippers, of your own personal knowledge?

A. Yes, from the moment that the agency hands it to me.

Q. How often have you seen the signatures of these particular shippers before?

A. Never.

Q. Did you ever see these particular shippers actually signing their names to any papers?

A. I cannot say.

Q. Your testimony is based entirely upon the fact that these letters are in the possession of the Spanish Line and shown to you now?

A. That they have come direct from Spain here to be shown here.

Q. Who brought them from Spain?

A. I do not know.

Q. All you know is that they are in the possession of the Spanish Line here in New York and shown to you?

A. Yes, sir.

Q. And as to the contents of these papers all you have testified [fol. 268] about that is what you have read in them here at this time?

A. What I have read.

Q. That is what you have read when these were shown to you by the lawyer here today?

A. When they have been shown to me.
Q. By the lawyer here on this examination, now?
A. Yes, sir.
Q. You have read off to us just exactly what appears on those papers?
A. Yes, sir.
Q. These papers were not attached to the bill of lading in any way, were they?
A. As I had no intervention, I cannot say whether they came with the bill of lading or not.
Q. But you do not know possibly that they were attached to the original bills of lading; you are not prepared to say that they were, are you?
A. I cannot say as to that.
Q. Your signature does not appear on these papers anywhere does it?
A. No, sir.
Q. Nor none of the officers of your ship?
A. No, sir.
Q. No officer of the Isla de Panay has signed these papers?
A. No, sir.
Q. No officer of the Mogador has signed these papers?
A. No, sir.

Mr. O'Neill: I move to strike out all the testimony of the witness concerning the three letters shown him, on the ground that he has no personal knowledge of the correctness of the contents of the letters, the authenticity of the signatures, nor of anything else con- [fol. 269] cerning these letters whatever excepting that they have been shown to him by counsel for the steamship Isla de Panay here today on this examination, and he has testified concerning what he assumes to be the fact after reading these letters.

KINGDOM OF SPAIN,
Province of Seville,
Consulate of the United States of America, ss:

I, Robert Harnden, Consul of the United States of America, do certify that Antonio Pastrana, Diego Garcia, Jose Montiel, Jose Benjumea, Mariano Santacana, and Manuel Samano, the witnesses, personally appeared before me on the respective dates as set forth in the depositions, and after being sworn to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition and did, in my presence, subscribe the same, and indorse the exhibits annexed thereto. And I further certify that Emilio Garcia gave up his work in the loading and unloading of the "Mogador" some time ago and his present whereabouts are unknown; and that Angel Rodiguez has left the office of the agency in Seville of the Compania Trasatlantica and his [fol. 270] present whereabouts are unknown; and that Juan Cas-

anova died in Seville about a year ago; and that the depositions of these witnesses have therefore not been made before me. And I further certify that I have subscribed to each half-sheet thereof, and to each exhibit.

The execution of this Commission appears in certain schedules hereunto annexed.

Robert Harnden, Commissioner, Consul of the United States of America. (Seal.) 2 Consular stamps.

(Transmitting six depositions.)

Fee No. 28.	Fee for certificate 206 words.....	$10.00
Fee No. 29.	Typewritten copy.....	1.00
		$11.00

$11.00 equal to Pesetas 75.90

[fol. 271] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

CROSS-INTERROGATORIES TO ANTONIO PASTRANA

First Interrogatory. State your full name, age and place of residence.

Answer. Captain Antonio Pastrana, 36 years of age, residing at 162 Sepulveda Street, Barcelona, Spain.

[fol. 272] Second Interrogatory. State whether you were employed in the months of October and November, 1917, and if so, by whom. If you state that you were employed during the months of October and November, 1917, by the claimant, Compania Trasatlantica, state in what capacity you were employed, and what your duties were in that capacity.

Answer. During the months of October and November, 1917, I was employed by the Compania Trasatlantica as Captain of the S. S. "Mogador" belonging to said company and as such, my duties were: to navigate the above vessel between Seville and Cadiz on the Guadalquivir River, Gulf and Bay of Cadiz; to receive goods for shipment on the "Mogador" at Seville for foreign ports via Cadiz; and to sign the corresponding bills of lading; to receive goods at Cadiz consigned to Seville and to carry same to Seville and there make delivery of these goods.

Third Interrogatory. If in answer to the second interrogatory you state that you were employed by Compania Trasatlantica during October and November, 1917, as Captain of the S. S. "Mogador," state whether the S. S. "Mogador" is a river boat or a seagoing ship, and give the details of her length, heighth, breadth, material of which constructed, number of decks, number of holds, number of hatches, upon what waters she was operated, and for what purposes

she was used in the months of October and November, 1917. Also [fol. 273] state how long you have held a master's license, how long you have been employed on board ship on any vessels, including the "Mogador," giving the names of the vessels and the capacities in which you were employed, and how long you have been employed by the Compania Trasatlantica, both general and also on the S. S. "Mogador."

Answer. The S. S. "Mogador" is a vessel designed for river and coast wise navigation and has the following specifications: length, 50.40 meters; breadth, 7.44 meters; height, 4.28 meters; hull, iron; one deck; two holds and two hatches. It navigated from Seville to Cadiz on the Guadalquivir River, Gulf and Bay of Cadiz, on the Atlantic, carrying general cargo between these two cities for transshipment in other vessels of the Compania Trasatlantica for foreign ports; and from Cadiz to Seville, also with general cargo from foreign ports, shipped in vessels of the above mentioned company. I have held a master's license since the year 1910 and that of pilot since 1902 having navigated as officer on the barque "Sebastiana" and the steamships "Pedro Luis Lacave," "Jose Aramburu" up to 1909 and from that date on the steamships, "Legazpi," "Buenos Aires," "Alicante," "Reina Maria Cristina," "Alfonso XIII" and "Alfonso XII" of the Compania Trasatlantica and from 1912 to March, 1919, as captain of the S. S. Mogador."

Fourth Interrogatory. If you state in answer to the second inter- [fol. 274] rogatory that you were captain of the S. S. "Mogador" in the months of October and November, 1917, please state whether you recollect three shipments of certain merchandise said to consist, one of 100 casks of olives consigned by Joseph Y. de Terry for shipment to E. Sanchez & Co. of New York, another of 158 casks of olives consigned by Rowlett & Pyman for shipment to Austin Nichols & Co. of New York, and the third of 69 casks of olives consigned by Rowlett & Pyman for shipment to Austin Nichols & Co. of New York by the S. S. "Mogador" and S. S. "Isla de Panay" in October, 1917. If yea, did you see said merchandise when it was presented for shipment by the consignors and before it was loaded into the S. S. "Mogador"?

Answer. I remember to have seen two shipments of casks of olives, one of 100 casks shipped by Joseph Y de Terry and consigned to E. Sanchez & Co. of New York and another of 158 casks shipped by Rowlett and Pyman consigned to Austin Nichols and Co. of New York. I also remember to have seen the shipping documents of a third shipment of 69 casks of olives shipped by Rowlett and Pyman and consigned to Austin Nichols and Co. of New York for which there not being space on the "Mogador," the agency of my company at Seville decided, with the shipper's consent, to send by rail to the dock at Trocadero on the Bay of Cadiz, which casks I also remember to have seen taken from a lighter and loaded on the S. S. "Isla de [fol. 275] Panay" while I lay alongside said vessel in the "Mogador" trans-shipping cargo from Seville to the "Isla de Panay."

Fifth Interrogatory. If you state in answer to the Fourth Interrogatory that you recollect said shipments of merchandise and that you saw the same when presented for transportation and before they were loaded on the S. S. "Mogador," please state whether said mer-

chandise was contained in casks and if so describe fully the condition and appearance of said casks at the time that you saw them, mentioning especially (a) the condition and appearance of the staves of the casks, (b) the condition and appearance of the hoops of the casks, (c) the condition and appearance of the heads of the casks, (d) whether the brine was leaking from any of the said casks; (e) whether the casks appeared to be old or new, and (f) whether the casks were recoopered or repaired upon the dock before being loaded upon the "Mogador." In your opinion were these casks sufficiently strong for shipping the merchandise in question to New York City.

Answer. The first two shipments of the above mentioned merchandise were contained in casks whose outside condition was as follows: (a) the staves were considerably worn and distorted, (b) the hoops were very rusty and, as a consequence, thin; (c) the heads of some of the casks appeared to be convex and others concave with irregularities, (d) brine was leaking from many of the casks which [fol. 276] coopers, sent to the dock by the respective shippers, were attempting to stop and prevent further leakage; (e) the casks appeared to be old and weak and were made of chestnut wood and consequently frail. (f) As above stated the casks were repaired on the wharf before being loaded by the coopers of the shippers who repaired the leaks by stuffing paper between the staves. This stopped the leaking for the time being. In my opinion the condition of these casks did not absolutely guarantee their arrival in good shape at their destination, having especially in mind the shipment in Seville and the trans-shipment in Cadiz. For this reason I felt it my duty to notify my company's agent in Seville of the bad condition of these casks.

Sixth Interrogatory. If you state in answer to the Fourth Interrogatory that this merchandise was presented to you for shipment from Seville to New York, please state whether you accepted it for shipment and issued bills of lading for the same. Are claimant's exhibits 2, 3 and 4, which are shown you herewith, the bills of lading which you issued for this merchandise, and is the signature of the Captain thereon your signature? If yea, please state the exact circumstances and conditions under which you issued these bills of lading and attach the same to this answer.

Answer. What I did was to accept these casks aboard my vessel following written instructions from the agent having previously con- [fol. 277] sulted with the agent regarding their bad condition. The bills of lading are exclusively issued by the agent and are signed with a rubber stamp bearing my name. The signatures on claimant's exhibits numbers 2, 3 and 4 shown to me by the commissioner are those of the rubber stamp bearing my name and I acknowledge them to be mine. I did not issue, as before stated, the bills of lading, this being done by the agent only, but I knew that on account of the bad condition in which the casks were received, the agent after being informed by me of their condition, demanded and obtained of the shippers letters of guarantee relieving the Compania Trasatlantica from all responsibility for damaged condition on arrival at port of destination. These letters of guarantee took the place of notations on the

bills of lading that in this case as in others, were not noted thereon at the shipper's request.

Seventh Interrogatory. If in answer to the Fifth Interrogatory you state that in your opinion the casks containing the olives were not sufficiently strong for shipping the olives to New York City, please state why you did not note the condition of the casks upon the bills of lading which you issued and which are marked Claimant's Exhibits 2, 3 and 4.

Answer. I did not issue bills of lading for the reasons above stated understanding that the agent of the Compania Trasatlantica in Seville accepted, at the shipper's request, the substitution of the letters [fol. 278] of guarantee for the notations on the bill of lading so relieving the said company from all responsibility for damaged condition on arrival at port of destination.

Eighth Interrogatory. If in answer to the Seventh Interrogatory you state that you did not note upon the bills of lading the condition of the casks as described by you at the request of the consignors, upon delivery of certain letters of guaranty to you or your company, Compania Trasatlantica, the claimant herein, please state whether you personally saw these letters. If yea, state the circumstances under which you saw them and say whether Claimant's Exhibits 13, 14 and 15 for identification which the Commissioner will show you, are the letters in question, and if so have them marked as Exhibits by the Commissioner and attach to your answer. State in detail the circumstances under which these letters were received. Please state what the custom is in Spain, according to your own experience, with regard to omitting to note the condition of defective containers upon the bills of lading when letters such as Claimant's Exhibits 13, 14 and 15 for identification are given by the consignors.

Answer. I did not see the letters of guarantee although I know by information from the agent that they were delivered to his office as usual before the bills of lading were delivered to the shippers. I do [fol. 279] not know the system following by other companies regarding letter of guarantee.

Ninth Interrogatory. If you state in answer to the Seventh Interrogatory that you issued bills of lading for the merchandise in question, was said merchandise of the first and second shipments, covered by bills of lading, Claimant's Exhibits 3 and 4, thereafter loaded upon the "Mogador" at Seville, and if so, did you see it so loaded. If so, and you know, describe in detail the way in which said loading was done, stating (a) whether the casks were loaded from lighters or from a dock onto the "Mogador"; (b) how the casks were lifted and brought from the wharf or lighter onto the ship, whether by steamer's winch or otherwise; and (c) if they were carried by slings how many casks were placed in each sling and how they were held in place in the slings, whether upright or on the bilges; (d) in what holds and on what decks said casks were stowed; (e) whether or not said holds were cleaned before the casks were stowed therein; (f) whether all were stowed under deck or some were stowed upon deck and if any were stowed upon deck whether they had any covering over them, and if so what said covering consisted of.

Answer. The 258 casks of olives covered by the claimant's exhibits numbers 3 and 4 included in the bills of ladings numbers 1 and 3 were personally seen by me and were shipped and stowed on the [fol. 280] S. S. "Mogador" in the same condition mentioned above. (a) From the wharf. (b) With slings operated by the vessel's winches and controlled by a guiding rope ashore (c) on the bilges and one by one (d) In both holds. I cannot remember the number placed in each hold. (e) Yes. (f) About 85 casks were placed on deck and approximately 200 in the holds. Those on deck had planks placed over them to protect them from, and, at the same time facilitate the passing of the crew.

Tenth Interrogatory. Where did the "Mogador" carry the casks in question covered by bills of lading, Claimant's Exhibits 3 and 4? If you state that it carried them from Seville to Cadiz, please state upon what waters it carried them, at what day and hour the "Mogador" left Seville and at what day and hour it reached Cadiz and at what day and hour the merchandise from Cadiz was unloaded from the "Mogador," and whether it was unloaded upon the dock or upon lighters. If upon lighters please describe said lighters as to size, hatches and tackle and state how the casks were stowed in said lighters.

Answer. The 258 casks included in the bills of lading numbers 1 and 3 corresponding to Claimant's Exhibits 3 and 4 were carried by me from Seville to Cadiz on the "Mogador" at the end of October 1917. I cannot fix the exact dates and hours of sailing from Seville and arrival at Cadiz. I delivered the cargo direct to the S. S. "Isla [fol. 281] de Panay," from board to board.

Eleventh Interrogatory. If in answer to the Tenth Interrogatory you state that the casks of olives covered by said shipments were unloaded from the "Mogador" at Cadiz, please state whether you saw them while they were being unloaded or immediately thereafter and if so, whether said casks were in the same condition as when they were presented for shipment at Seville and loaded upon the "Mogador" and if not in what particulars their condition varied.

Answer. All the casks that the S. S. "Mogador" took in Seville were delivered aboard the S. S. "Isla de Panay" at Cadiz in my presence, and I was in a position to notice that they had not suffered any further damage during their transportation and trans-shipment to the latter vessel than that previously stated.

Twelfth Interrogatory. Were the casks containing the merchandise in question damaged in any way while being loaded in the "Mogador," transported from Seville to Cadiz or while being unloaded from the "Mogador" to your knowledge.

Answer. As just stated, these casks did not suffer any further damage during their loading and transportation on the "Mogador" and their trans-shipment to the "Isla de Panay."

[fol. 282] Thirteenth Interrogatory. Please state, of you know, whether the merchandise in question was unloaded from the "Mogador" directly upon the decks of the "Isla de Panay" or whether it was unloaded first on a lighter or a dock and then loaded upon the

"Isla de Panay." Describe fully exactly how this was accomplished, and state whether slings were used in unloading from the "Mogador" and if so, how many casks were carried in each sling and whether the casks were kept in an upright position or on the bilges while in the sling.

Answer. The casks in question, as previously stated, were transshipped direct from the S. S. "Mogador" to the S. S. "Isla de Panay" both vessels lying alongside. The casks were taken from the "Mogador" by the "Isla de Panay" one by one with slings and on their bilges.

Fourteenth Interrogatory. Please state whether the merchandise covered by bill of lading, Claimant's Exhibit 2, was loaded on the "Mogador" and carried from Seville to Cadiz, or whether it was sent by railway cars. If you state that it was sent by railway cars and not on the "Mogador," please state why it was sent by railway, if you know. Did you see this merchandise after its arrival in Cadiz and if so was it in the same apparent condition as when it was presented for shipment at Seville?

Answer. The casks included by the claimant's exhibit number 2 corresponding with bill of lading number 4 from Seville to New [fol. 283] York S. S. "Isla de Panay" trip 11—1917 extra voyage to New York, covering 69 casks of olives, could not be admitted on board for lack of space. Understanding that these 69 casks were sent by railway to the Trocadero wharf on the Bay of Cadiz, and having seen these casks unloaded from a lighter and shipped on the "Isla de Panay" when I was alongside said vessel delivering the cargo of casks which I took in Seville, and being able to see that these 69 casks, being taken from the lighter by the "Isla de Panay" had the same defects as those shipped on my vessel, I could see that these 69 casks had suffered no further damage and were in the same condition as that mentioned above.

Fifteenth Interrogatory. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Answer. As a result of my years of shipping experience, receiving and delivering all kinds of cargoes I am able to affirm that the olive casks of an approximate measure of 1.25 cubic meters and of a weight from 750 to 900 kilos was never a container to thoroughly guarantee the safe arrival of olives at their destination. This fact has undoubtedly had weight with shipping agents in ports of Central [fol. 284] America in one of which, Colon, it has been decided not to admit containers of this class. Formerly these casks were constructed of oak which carried further gurantee of arrival in good condition at port of destination. The increase in the price of oak has caused the substitution of chestnut wood in the construction of olive casks thereby robbing them of much of their strength. The European War made oak more and more difficult to obtain to such an extent that it became impossible to find enough for export com-

merce, and it was necessary to utilize all kinds of containers irrespective of their conditions in order to ship by water, a condition which made it imperative for the Compania Trasatlantica to protect itself against possible claims for the bad arrival of such containers some of which, although not broken (in which case, broken casks were replaced by others) showed sufficient signs of wear from excessive use, in tops, bottoms and sides to completely justify and make necessary some method of defense against possible claims. On the other hand, the material impossibility of carefully examining one by one all the casks of a certain shipment and the manifest injustice of characterizing a whole shipment as in bad condition because some of its casks should be damaged thereby prejudicing the consignee, has led to the practice of accepting by my company of letters of guarantee which the shippers invariably solicit with the desire to avoid notations on the bills of lading. The vessels which carried [fol. 285] the 69 casks from the Trocadero wharf to the "Isla de Panay" had the following approximate specifications:

Length	20	meters.
Beam	3	"
Draft	3	"

They had only one hatch and one winch for loading and unloading. The casks were on their bilges stowed with four wedges and quoins to prevent the casks touching the bottom of the vessel.

[fol. 286] CROSS-INTERROGATORIES TO CAPT. ANTONIO PASTRANA

First Cross-interrogatory. State what experience you have had in the carriage of olives:

(a) On inland routes in Spain.
(b) In the trans-Atlantic or other foreign trade.
(c) Approximately how many cargoes of olives have you carried as Captain of the "Mogador"?

Answer. I acquired it during the years I spent at sea. (a) No. (b) Yes, and in the Spanish coastwise trade. (c) Many, without being able to determine the exact number.

Second Cross-interrogatory. Please state in your experience,
(a) How in your experience olives are usually packed.
(b) If you say in casks, what is the usual size of the casks?
(c) Of what wood are they usually made?
(d) What is the best size for an olive cask, and why?
(e) What size casks are usually used for trans-Atlantic shipment?

Answer. (a) In casks, half-casks, barrels of all sizes and including kegs. Also in cases in which glass bottles or tins were packed. [fol. 287] (b) The approximate size of a cask is 1.25 cubic meters weighing from 750 to 900 kilos. (c) Of chestnut wood. (d) As far as the shipping companies are concerned, the smaller their size

is the better because the smaller ones are easier to handle and stow.
(e) Of 1.25 cubic meters and weight from 750 to 900 kilos.

Third Cross-interrogatory. Please state:

(a) How large were the casks containing olives which were loaded on the "Mogador" at Seville in September or October, 1917, consigned to Austin Nichols & Company or E. Sanchez & Company.
(b) Were they the usual and ordinary casks for containing olives?
(c) Were they of the usual size of olive casks?
(d) Had you ever before seen olives packed in casks as large as these casks?
(e) How often had you seen casks of that size used to ship olives?

Answer. (a) Of an approximate size of 1.20 cubic meters and 750 kilos weight. (b) They had the defects of age and weakness. (c) Yes. (d) Yes. (e) Very frequently.

Fourth Cross-interrogatory. (a) Did you examine any of the casks consigned to E. Sanchez & Company or Austin Nichols & Com-
[fol. 288] pany at Seville? If so, how closely?
(b) Did you touch or handle any of them?
(c) State exactly how you examined the casks—when, where and how many of them, so as to obtain the knowledge on which you base your answer to the fifth interrogatory.

Answer. (a) I made a personal inspection sufficient to convince myself of their bad condition. It was not necessary to handle them in order to see their defects. (b) It was not necessary. (c) I made the above inspection on the wharf and also aboard at different times and of large quantities of casks the exact number of which I do not remember. It was always my practice to make such inspection in order to relieve my Company and myself of responsibility and also as it was my duty, as sole deck officer, and captain, to do so.

Fifth Cross-interrogatory. Were the casks loaded in the holds or on the decks of the lighters at Seville and in how many tiers were they loaded in the lighters?

Answer. In Seville they were not loaded from lighters but direct from the dock into the "Mogador" except the 69 casks sent by rail.

Sixth Cross-interrogatory. To whom did the lighters from which the olives were loaded on the "Modagor" belong? By whom were they operated? Under whose control were they.

[fol. 289] Answer. No such lighters were used in Seville.

Seventh Cross-interrogatory. Please state:

(a) What was the freeboard of the lighters at Seville from which the olives were loaded on the "Mogador" before any olives were unloaded from them.
(b) What was the freeboard of the lighters at Cadiz on which the olives were loaded after they were fully loaded.
(c) If the sea was rough at Cadiz when the olives were discharged from the lighters and lowered on the Isla de Panay.

Answer. (a) and (b). No such lighters were used in Seville. (c) No.

Eighth Cross-interrogatory. If you state that any of the casks were recoopered before being loaded in the lighters from the "Mogador" or from the lighters to the Isla de Panay.

(a) State what happened to them to necessitate their being recoopered.

(b) State in detail what was done to such casks.

(c) Who did the work.

Answer. (a) That they were leaking. (b) To tighten the hoops, changing some of them and inserting paper with chisel and hammer in the joints between the staves where leaking showed. (c) The [fol. 290] coopers detailed for this work by the shippers.

Ninth Cross-interrogatory. State as to any of the casks mentioned in the preceding interrogatory, while being loaded on the "Mogador" at Seville, or while on the steamer from Seville to Cadiz, or while being unloaded upon lighters at Cadiz:

(a) Whether any of the casks were broken.

(b) How many were broken, and where each was broken.

(c) If so, how they were broken—as to the hoops, staves or other parts.

(d) Whether any of the heads were warped, and if so, about how many.

(e) Were they loaded from lighters at Seville, and if so, in how many tiers were they stowed in the lighters?

(f) Whether any hoops were missing, and if so what hoops, and from how many casks?

(g) Whether any of the hoops were rusty, and if so to what extent? Did you examine any hoops personally to ascertain this? How thick was the rust?

(h) Did you ever load any other casks at Seville with the heads warped.

(i) Whether any hoops came off the casks while they were being loaded on the "Mogador." If so, state (1) what was done with the [fol. 291] said hoops; (2) whether you reported their coming off to the consignors; (3) whether you did anything to replace the hoops or repair the casks.

Answer. (a) Not broken, but they were old and weak. (b) None of them. (c) They were not broken but the greater part of the heads staves were warped as well as those of the sides. I am unable to state the exact number of casks in this condition. (d) I am unable to state the exact number. (e) No. (f) Some of the hoops broke, on being tightened and others were substituted, I do not remember how many. (g) Yes, the majority of them were rusty but to what extent I am unable to say. The defective condition of these hoops was apparent to the eye. I could see, without making further investigation due to my experience with containers of this kind, that they were in bad shape. I do not remember the thickness of the rust. (h) Yes, various times. (i) It is impossible to say whether any hoops came off the casks while being loaded on the "Mogador." If such happened, the cooper of the shipper was asked to repair the damage before stowing the barrel on the "Mogador," damaged hoops being replaced by stronger ones.

Tenth Cross-interrogatory. If you stated that any of the casks broke please answer the following questions:

(a) Did the casks which broke, break as they were being raised from the lighter to be loaded on the "Mogador"? If so, how many casks then broke?

[fol. 292] (b) Did any of the casks break while they were being lowered into the "Mogador"? If so, how many casks then broke?

(c) Did any casks break when they reached the hold of the "Mogador" and came to rest there as they were lowered into the "Mogador"? If so, how many casks then broke?

(d) Did any casks break after they reached the hold of the "Mogador"? If so, how many casks then broke?

(e) Did any casks break as they were being raised from the hold of the "Mogador" at Cadiz? If so, how many casks then broke?

(f) Did any casks break while they were being lowered into the lighter at Cadiz? If so, how many?

(g) Did any of the casks break when they reached the deck of the lighter at Cadiz? If so, how many, and what was the cause of their breaking?

(h) Did you actually see all the casks break which you have stated did break?

(i) Did you actually see any of the casks break which you have stated did break? How many?

Answer. (a) As far as I remember no casks were broken when they were loaded direct from the wharf to the "Mogador." If such [fol. 293] happened they were replaced by others. (b) I believe not. (c) No. (d) No. (e) No. (f) They were not given to lighters but loaded direct from the "Mogador" to the "Isla de Panay." (g) Those carried by the "Mogador" were not given to lighters. (h) I have not affirmed that any casks broke nor can I affirm that none were broken. They might easily have been broken due to their bad condition. If any were broken they were repaired or replaced by others. (i) I have already answered this in the previous question.

Eleventh Cross-interrogatory. If any of the casks leaked, please state:

(1)-a. Whether any of the casks leaked as they were raised from the lighter to be lowered in the hold of the "Mogador" at Seville. b. How much did they leak? c. How many casks leaked?

(2)-a. Whether you actually saw any of the casks leak while being raised from the hold of the "Mogador" at Cadiz? b. How much did they leak? c. How many casks leaked?

(3) Did any of the casks leak while being lowered into the "Mogador,"—how many so leaked?

(4) Did any of the casks leak while being lowered upon the lighters? How many so leaked?

[fol. 294] (5) Did the casks leak while standing still or only while being moved?

(6) Did you actually see any liquid running from any of these casks at Seville while being raised from the lighters or lowered into the "Mogador"?

(7) Did you actually see any liquid running from any of these casks at Cadiz when being raised from the hold of the "Mogador" or lowered into the lighters?

(8) Were the casks that leaked at Cadiz the same casks that leaked at Seville?

(9) Did any of the casks leak while they were standing still, or did they leak only when they were being moved? To exactly what extent did they leak when standing still or when being moved?

(10) State exactly to what the leaking was due in each case.

(11) Is it not a fact that there is always more or less leakage from olive casks?

Answer. (1)-a. They were not loaded on the "Mogador" by lighters but directly from the wharf where many of them were leaking. -b. I do not remember. -c. I do not remember. (2)-a. I do not remember, but if such happened the hoops were tightened by the carpenter of the "Isla de Panay" as is customary. -b. I do not remember. -c. I do not remember. (3) I do not think so, but if such happened they were left on deck and the cooper of the shipper [fol. 295] proceeded to repair the leakage. (4) They were not lowered to lighters. (5) Many of them were leaking continuously, especially when moved and continued leaking until repaired. (6) They were not taken from lighters. (7) I do not remember. (8) I do not remember. (9) This question is already answered in question number (5). (10) The leaking was due, in general, to faulty joints between the staves which was remedied by tightening the hoops by the use of excessive pressure and inserting paper in the joints by a chisel in those places which were not closed by the tightened hoops. All this excessive force was detrimental to the hoops. (11) Leaks are very frequent but an attempt is always made to remedy them before shipment.

Twelfth Cross-interrogatory. If you testify as to the condition of these casks, or containers of olives in this case state:

(1) What examination did you make of the barrels?

(2) What tests, if any, did you make to test the soundness of the casks?

(3) In detail, what casks you claim that you saw.

(4) If you know, were the casks which you saw being used for the first time on this trip.

(5) If not, how long had they been in use?

(6) How do you know they had been so long in use.

[fol. 296] (7) If you examined each barrel and cask to see about its condition.

(8) Where the casks were when you examined them.

Answer. (1) Ocular examination. (2) I considered such examination to be sufficient due to my experience in such matters. (3) I do not remember. (4) They were all old and weak but I could not say for how long they had been in use. (5) It is impossible to say. (6) I suppose they had been in use due to their bad condition although I am unable to say whether they had been used or not. (7) I examined the majority of them but am unable to state the exact number. (8) On the Seville wharf.

Thirteenth Cross-interrogatory. From whom were the casks in which said olives were shipped obtained by the persons who packed and shipped said olives?

Answer. I do not know.

Fourteenth Cross-interrogatory:

(a) Did you superintend the loading of the casks on board the "Mogador?"

(b) Did you give any instructions as to the way in which they should be loaded?

(c) Did you see them when stowed in the holds of the steamer?

(d) State just how they were raised from the wharf or dock and [fol. 297] loaded into the hold, and from the hold into the lighters at Cadiz?

(e) Describe minutely the slings in each case and how they were fastened to the lifting apparatus, and how the casks were fastened in the slings.

(f) Were any metal clamps or hooks used to hold the casks at each end?

Answer. (a) The loading and stowing were directed by the foreman, Diego Garcia, that being his duty, but I also watched these operations. (b) Probably not; because the foreman understood his work thoroughly. (c) Yes. (d) They were loaded one by one from the wharf to the "Mogador" by the winch of the vessel with slings and on their sides guided from the wharf. (e) The slings were made of hemp rope of 1¼ inch thickness which were passed double beneath each barrel thereby making a running noose which noose was attached to the hook operated by the winch. (f) No clamps of any kind were used.

Fifteenth Cross-interrogatory. Please state:

(a) Exactly where you were when the steamer "Mogador" was loading olives at Seville, Spain, in October, 1917.

(b) During what hours of the day was she loading cargo.

(c) Were you on board the "Mogador" when she was loading this cargo?

(d) When and how long were you on board her?

[fol. 298] (e) Where were you on the vessel, when you were on her?

Answer. (a) On board the "Mogador". (b) From 7 to 5 with two hours for lunch. (c) Yes. (d) I was always on board while work was being done. (e) Everywhere without distinction and especially on deck near the hatches.

Sixteenth Cross-interrogatory. Please state:

(a) How the casks were placed in position in the "Mogador."

(b) How were they taken from the slings?

(c) How many men would handle one cask in the hold?

(d) Were the casks rolled to their places or carried on trucks?

(e) How were they raised to the upper tiers in the hold?

(f) Did any of them break while being lifted from the wharf or being placed in the holds?

(g) If so, how many of them broke and in what way?

Answer. (a) On their sides about 200 in the holds and about 85 on deck. (b) By lifting, alternatively, the heads of the barrels so that the slings could be withdrawn. (c) Eight men. (d) The first tier were rolled on the floor of the hold. (e) The casks were suspended, or rolled on planks placed on the lower tier, into their [fol. 299]position between two casks on the tier below. (f) I do not remember, but if any broke, they were repaired or replaced by others. (g) I do not know.

Seventeenth Cross-interrogatory. Please state whether there were any for and aft or athwart-ships, boards or planks used as dunnage for these casks of olives, and if you know, state

(a) Upon what the ends of these planks rested in each hold.

(b) Upon what the parts of said planks between them was rested in each hold.

(c) Whether any of the said planks rested on the bilges of the said casks and, if so, just where they were located.

(d) Whether the casks on which the said planks rested were standing on end or lying on their bilges in each of the hold.

(e) Whether there were any casks on top of said planks and, if so, whether they were standing on end or lying on their bilges.

(f) Just how many casks that were standing on end were dunnaged in each of the holds.

(g) Whether the boards or planks were fastened in any way, and if so, describe in detail how and to what they were fastened in each hold.

[fol. 300] (h) Whether there were two or more tiers of casks, whether there were boards or planks between them, and, if so, whether said planks rested on the ends or on the bilges of the casks, and whether the ends or bilges of the casks rested on the planks beneath them.

Answer. Yes. (a) The ends of these planks were resting on dunnage placed on the ends of the casks. On top of this dunnage, planks were placed fore and aft which were suspended over the casks without touching them. These planks are used during stowing only and are removed as the second tier is being stowed, and the casks of the new tier are firmly fixed in position by quoins. (b) On the planks that were between each cask. (c) No. (d) They were on their sides with their ends fore and aft. (e) No, because these planks are used only for rolling the casks that are stowed on the second tier. These planks are so used to avoid damage to the lower tier and to facilitate placing them in their position. (f) No casks were standing on end in the holds. (g) The planks were loose. (h) There were two tiers in one of the holds and three in some places in the other, although not more than twenty casks were in the third tier. There were no planks between the tiers but only the four quoins needed by each cask.

Eighteenth Cross-interrogatory. With reference to the planks, if any were used as dunnage, please state:

[fol. 301] (a) Whether the planks cleared the bilges of the casks below them.

(b) What distance there was between the planks and the bilges of the casks.

(c) Did you make any actual examination to see if these planks cleared the bilges of the casks?

(d) How did you make such examination?

(e) Was there any cargo stowed between the top tier of barrels and the deck of the steamer above the top tier of barrels.

(f) If so, how much space was left in the steamer between the top tier of casks and the deck above in each hold.

Answer. (a) No planks are used between the tiers because they are not necessary. The stowing of the casks is done as follows: A tier is placed on the flooring of the hold with the ends of the casks fore and aft. Then quoins are placed underneath them to prevent any movement of the casks and also to prevent the bilges from touching the floor. On top of this tier the planks referred to above are placed and the stowing of the second tier begins. Placing each cask of the second tier between the space of the two casks of the lower tier. Then quoins are placed on either side of the cask to prevent any movement, also to prevent the bilges from touching the lower casks. (b) This is already answered in the question [fol. 302] 18-(a). (c) This is already answered in the question 18-(a). (d) This is already answered in question 18-(a). (e) No. (f) In one of the holds a space of about 80 centimeters was left between the last tier and the deck and in the other one a space of about 1.50. No cargo was stowed between any of these two spaces.

Nineteenth Cross-interrogatory. Were any of the casks of olives stowed on their ends, and if so:

(a) Where were they so stowed?

(b) In which holds and which parts of the holds were they so stowed?

(c) How many were so stowed?

(d) In how many tiers were they stowed in each place in which they were stowed?

(e) What was stowed under said casks in each place.

(f) What was stowed above said casks in each place.

Answer. No.

Twentieth Cross-interrogatory. If in stowing said olives in the said steamship "Mogador" or in said lighter, there were no boards or planks used in any places, state in which holds or places there were no such boards or planks used.

Answer. They were used in the two holds and on deck.

[fol. 303] Twenty-first Cross-interrogatory. Annex to these interrogatories diagrams showing just how the tiers of casks were stowed on top of one another in each of the holds of the steamer and also on the lighters, giving a side view, top view and end view, and indicating on the said diagram where the dunnage was placed and what it consisted of.

Answer. I do not know how to draw.

Twenty-second Cross-interrogatory. If you saw the loading of the casks of olives in this action into the "Mogador" at Seville, Spain,

or from the "Mogador" to the lighter at Cadiz, or from the lighters to the Isla de Panay at Cadiz, please answer the following:

(1) Did you go aboard either of said ships or said lighters?
(2) How many times did you go aboard said "Mogador" or said lighters?
(3) Did you stay on the deck of said "Mogador" or of said lighters or either of them?
(4) Did you go into the lower holds of said "Mogador" or into the hold of said lighters or either of them?
(5) Did you stay on the deck and look into the hatchway of said "Mogador" or of said lighters or either of them?
(6) If you did not go into the hold, how much of said hold could you see from the hatchway?
[fol. 304] (7) Did you go into the hold of said "Mogador" or of said lighters after they were partly loaded?
(8) Did you make a special trip into the hold of the "Mogador" to look at the dunnage?
(9) Why did you take so much interest in the dunnage?
(10) How is it that you can remember this particular dunnage, planks, wedges, chocks or quoins after more than two years.
(11) Did you examine the dunnage, chocks, or quoins in every ship on which you worked since October, 1917?
(12) On how many ships have you stowed olives since 1916.
(13) On how many steamers have you examined the dunnage, chocks or quoins and stowage of olives since October, 1917.
(14) Did you see each cask in this case, stowed on said "Mogador" or said lighters.
(15) How can you now recollect the stowage on said "Mogador" or said lighters?

Answer. (1) Aboard the "Mogador" and the "Isla de Panay." From the latter I saw the unloading of the "Mogador" and of the lighter which carried the 69 casks from the Trocadero which arrived there by rail. (2) I was on board both the "Mogador" and "Isla de [fol. 305] Panay" during the time these operations lasted. (3) On the decks of the "Mogador" and "Isla de Panay." (4) Yes, to those of the "Mogador." (5) Yes, in those of the "Mogador." (6) I went down to the holds although they could be seen nearly in all their extension from the hatchway. (7) Yes, to those of the "Mogador." (8) I do not remember, probably I did. (9) I always take the same interest in this matter, because of the responsibility that may weigh upon me in this respect. (10) I remembered them because the same procedure is followed in all shipments of casks. (11) I examined them frequently. (12) On the "Mogador." (13) Only in the "Mogador." (14) I saw the stowing of a great number of those shipped by the "Mogador." (15) Because the same procedure is always followed in what the "Mogador" is concerned.

Twenty-third Cross-interrogatory. Who owned or controlled the quay at Seville on which these olives were stowed before they were placed on board the S. S. "Mogador"?

Answer. The Junta de Obra del Puerto de Sevilla (Board of Seville Port Works).

Twenty-fourth Cross-interrogatory. (a) How many casks in all did you receive at Seville?

(b) How many did you discharge at Cadiz?

(c) Have you any entries in your log-book or elsewhere to that effect?

[fol. 306] (d) Give these entries in detail.

(e) Did any of the casks break or fall apart or lose any of their hoops on the way from Seville to Cadiz or while being unloaded from the "Mogador"?

(f) If so, state exactly how many were so broken or fell apart, when and where they did so break, and what you did with those casks that so broke?

Answer. (a) 285 casks. (b) 285 casks to the S. S. "Isla de Panay." (c) and (d) Probably, I made out the corresponding statement of cargo as usual, delivering same at the office of the Company at Cadiz. (e) I do not remember but if so happened they would have been repaired by the carpenter of the "Isla de Panay." (f) This has already been answered in question 24 (e).

Twenty-fifth Cross-interrogatory. (a) Did you see any of the olives spill out of the casks while being loaded at Seville or discharged at Cadiz?

(b) If so, to how many casks did this happen?

(c) State approximately how much of the contents of each such cask was spilled?

Answer. (a) No. (b) No. (c) No.

Twenty-sixth Cross-interrogatory. (a) Did you make any entry or entries in your log-book concerning the condition of this shipment of olives?

[fol. 307] (b) If so, what was it?

(c) Give all such entries?

(d) Can you produce your log-book?

Answer. (a) to (d) No.

Twenty-seventh Cross-interrogatory: Describe exactly and in detail the weather, wind and sea, you encountered after leaving the Guadalquivir until you reached Cadiz, using the Beaufort Scale to indicate the velocity of the wind. Did the ship roll?

Answer. I remember that the weather was good, but I am unable to remember any more details of this trip.

Twenty-eighth Cross-interrogatory: Were the bilges of the "Mogador"

(a) Sounded on the trip from Seville to Cadiz? If you say that they were sounded, please state:

(b) When they were sounded.

(c) How often were they sounded.

(d) What was found in the bilges.

(e) How much water was found at each sounding.

(f) Was there any olive brine found in them, and if so, how much?

(g) How often were the bilges pumped out?

[fol. 308] (h) On other trips, how often were the bilges sounded, how much water was found in them and how often were they pumped out?

(i) Did you watch constantly to see what was coming from the bilges?

(j) How do you know whether any olive brine was or was not in the bilges?

Answer. (a) to (j). Due to the small size of the boat, the frequency that the bilges and holds are seen while in ports, and the short duration of the ship from Seville to Cadiz, which is about eight or nine hours, the soundings are taken but once as the ship leaves the mouth of the river, unless an important cause like collision, running aground, etc., justifies further soundings.

Twenty-ninth Cross-interrogatory. (a) Is it your duty as Captain to reject all goods offered to you for shipment which you can see are not in good order and condition therefor?

(b) What is the practice in such cases?

(c) If you say that the 327 casks of olives shipped in the "Mogador", for which you gave bills of lading, were not in good order and condition for shipment to New York, please state exactly why you gave clean bills of lading for same to the shipper without making [fol. 309[any notation thereon of the condition of the olives or casks as received by you.

Answer. (a) My duty as captain is to notify the company of abnormal or bad condition of the cargoes received by me through written orders from the Company. (b) It is the Company that takes the necessary steps to prevent any responsibilities being charged against the Company or the ship. (c) Only 285 casks were shipped on the "Mogador" and the corresponding bills of lading were issued by the agency at Seville which as far as I understand issued such documents free from any notation—although the agency knew of the bad condition of the casks—at the shipper's request who offered to substitute such notations by letters of guarantee to the effect of saving the Company from any responsibility that it might have due to the bad arrival of the goods at the port of destination.

Thirtieth Cross-interrogatory. If you testify that any objections were made to the casks in which said olives were shipped or that any objections were made to receiving same on board said lighters or said "Magador" please answer the following questions:

(1) Whether you personally heard any of the alleged objections made?

(2) If so, to whom the alleged objections were made.

(3) Who made the alleged objections.

[fol. 310] (4) Did you personally make any of the alleged objections? If so, state exactly what you said and to whom you made said objections and what was said to you in reply.

(5) What did the alleged objections consist of, that is, exactly what did you hear said?

(6) Do you know by whom the man to whom said objections

were made was employed? If so, state by whom he was employed, and how you know this.

(7) In what capacity was the man to whom the said objections were made employed? How do you know this?

(8) To how many men were the said objections made?

(9) Give the names of all persons to whom said objections were made, and state, if you know exactly what was said to each one and exactly what he said in reply.

(10) If any of said alleged objections were made in writing please attach copies thereof hereto, or state why you cannot do so.

Answer. (1) I made them myself and the Company's foreman Diego Garcia. (2) To the agency and to the shipper's foreman. (3) The foreman Diego Garcia and myself. (4) Yes, I spoke to the shipper's foreman regarding the bad condition of the casks and [fol. 311] refused to take them unless a notation was made on the bills of lading or a consultation held with the agency. I notified the agency of this through the foreman Diego Garcia. I do not remember any further details to this effect. (5) I did not hear anything. Both the foreman and myself saw the bad condition of the casks and notified the shipper's foreman and the agency. (6) By the shippers. Because they delivered the cargo in the shipper's name for its shipment on the "Mogador." (7) This has already been answered in question 30 (5). (8) To all the shipper's foreman. (9) Owing to the length of time that has elapsed I can neither remember their names nor what they answered to my statements. (10) They were not made in writing but by word of mouth.

Thirty-first Cross-interrogatory. (1) How many shipments of olives have you seen shipped from Seville in bad order and condition?

(2) Did you see each of the bills of lading and receipt given for each one of such consignments, and see what notations were made on each?

(3 By whom and by what steamship line were such shipments made?

Answer. (1) A few, but I am unable to fix the exact number. Those that I saw were made on my ship. (2) and (3) No. As far as shipments made by other companies are concerned.

[fol. 312] Thirty-second Cross-interrogatory. (a) Did you personally receive the letters of guarantee, mentioned in the eighth direct interrogatory, from the consignors?

(b) Did you have any conversation with them?

(c) Did you draw their attention to the condition of the casks? If so, what did they say?

(d) Give, if you can, the name or names of the party or parties who gave these letters.

(e) Did they give them at your, or anyone else's request, or did they offer them voluntarily?

(f) Did you see the writing or signature of these letters?

(g) If so, state who wrote or signed them.

(h) Do you know the handwriting and signatures of these letters?

Answer. (a) No. (b) I do not remember whether I spoke with any of them. (c) I cannot remember. (d) I think they were Messrs. Rowlett and Pyman, Joseph y de Terry and Juan Tolibia. (e) As I understand they offered them to the agency in substitution of the notations on the bills of lading. (f) No. (g) I do not know. (h) I do not know the handwriting and I did not see the letters of guarantee until they were shown to me by the Commissioner.

[fol. 313] Thirty-third Cross-interrogatory. (a) Did you sign the bills of lading before or after the letters of guarantee were given?

(b) Did you refuse to sign the bills of lading unless these letters were given?

(c) Were copies of the bills of lading given the shippers?

(d) What was done with the letters of guarantee?

(e) Were any copies thereof attached to the bills of lading?

(f) Is it customary in Spain in such cases for the shipper to give such letters of guarantee?

(g) Is it not possible in such a case to negotiate the bills of lading apart altogether from the letters?

(h) What was the purpose of such a proceeding, that is, of securing letters of guarantee before giving the bills of lading?

Answer. (a) The bills of lading were signed with a rubber stamp bearing my signature. I suppose they were not delivered by the agency until the letter of guarantee had been received. (b) No. (c) Undoubtedly they were. (d) I do not know. They are always kept by the Company. (e) I do not know. (f) I do not know. (g) I do not know. (h) Evidently to avoid, that general character [fol. 314] given to the notations on the bills of lading—as it is impossible to examine one by one all the casks, would effect the whole shipment in a higher proportion than the true and just condition of the shipment. It is impossible for myself or any one else to estimate this proportion, due to the short time allowed for the shipping operations and also considering that the trans-shipment to the mail boat of the Compania Trasatlantica, had to be made at a fixed date.

Thirty-fourth Cross-interrogatory. For how many shipments of olives received in bad condition have you before and since October, 1917, given clean bills of lading? Have you always insisted upon and obtained letters of guarantee before giving such bills of lading.

Answer. I do not issue bills of lading.

Thirty-fifth Cross-interrogatory. (1) How have you been able to keep clear in your mind all the facts concerning which you have testified in answer to the direct interrogatories and these cross-interrogatories?

(2) Have you made a written statement in this case?

(3) If so, to whom did you give such statement and where is it now, if you know?

(4) Annex such statement or a copy thereof to your answers to these interrogatories.

[fol. 315] Answer. (1) This shipment has been more clearly fixed in my mind because it was composed of a whole cargo of casks, which perhaps has never happened to me before. (2) to (4) No.

Thirty-sixth Cross-interrogatory. (1) Have these cross-interrogatories been communicated to you either in form or substance prior to the time of your giving your testimony in this action?

(2) If so, state by whom they have been communicated to you and how.

(3) Have you had any communication with anyone concerning the testimony you should give on this occasion, and, if so, with whom?

(4) If so, what was then said to you in that connection?

(5) Have you refreshed your recollection as to anything you have testified to in answer to these interrogatories, if so, how have you done so?

Answer. (1) to (4) No. (5) I have forced my mind all I could and I am unable to add anything more to my deposition.

Thirty-seventh Cross-interrogatory. If any of your answers to any of these direct or cross-interrogatories are based on information given to you by others or statements made to you, state which of your said answers are so based.

Answer. All my answers are based on my memory refreshed by [fol. 316] documents and persons who are interested in this case.

Thirty-eighth Cross-interrogatory. If you gave any receipts or other document at any time for the said olives involved in this case, please annex copies thereof hereto.

Answer. I do not remember having issued any special documents relating to this shipment except a summary of the cargo to be received by me and sent me by the Seville agent and which I returned to him by the foreman with my remarks.

Antonio Pastrana.

Examination taken, reduced to writing and by the witness subscribed and sworn to this twenty-seventh day of October, 1921.

$94.00 in fee stamps.

Fee No. 34.—Fee for taking deposition, 4,220 words.....	$29.00
Fee No. 35.—Fee for typewritten copy.....	11.00
Fee No. 36.—Fee for translation.....	43.00
Fee No. 37.—Fee for carbon copy.....	11.00
	$94.00

Robert Harnden, Consul of the U. S. of America. Clifford W. McGlasson, Witness. Fernando Juan, Interpreter.

[fol. 317] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

INTERROGATORIES TO JOSE MONTIEL AND DIEGO GARCIA

First Interrogatory. State your full name, age and place of residence.

[fol. 318] Answer of Montiel. Jose Montiel seventy-one years old, living at 33 Canovas del Castillo Street, Cartaya, Province of Huelva, Spain.

Answer of Garcia. Diego Garcia, 49 years of age, living at 27 Santa Maria la Blanca Street, Seville, Spain.

Second Interrogatory. State whether you were employed in the months of October and November, 1917, and if so, by whom. If you state that you were employed during the months of October and November, 1917, by the claimant, Compania Trasatlantica, state in what capacity you were employed, and what your duties were in that capacity.

Answer of Montiel. As boatswain of the S. S. "Mogador" employed by the office of the Compania Trasatlantica in Cadiz. My duties being those inherent in my position.

Answer of Garcia. Yes. Employed as foreman and labor contractor for loading and unloading of the vessels of the Compania Trasatlantica by the Seville agency and as such, in charge of the receiving, loading, stowing and delivering of the goods.

Third Interrogatory. If in answer to the second interrogatory you state that you were employed by Compania Trasatlantica, the claimant herein, during the months of October and November, 1917, on the steamship "Mogador," please state what kind of a ship the "Mo-

[fol. 319] gador" is, what waters she traversed and for what purposes she was used in said months. Also state what her deadweight capacity was, how many decks she had, how many holds, and how many hatches for loading, whether or not she had tween decks, and describe the material of which her weather deck and sides were composed. Also state how long you have been engaged on the "Mogador," how long employed by Compania Trasatlantica, and what experience you have had on board vessels other than the "Mogador," giving the names of the vessels, the capacities in which employed, and the time when so employed.

Answer of Montiel. A steam-vessel of five hundred cubic meters cargo capacity and four hundred and sixty tons register, in good condition, sailing between Seville and Cadiz all the year around. It had one deck, two holds, two hatchways and tween decks in the bow. The deck was made of wood and the sides of the vessel were iron. The vessel was used in the transportation of all kinds of cargo on the Guadalquivir River, Bay and Gulf of Cadiz, between the ports of Seville and Cadiz. I have been engaged on the "Mogador" for about eight years which is the time I have been working with

the Compania Trasatlantica. I have sailed, prior to my employment by the above company, twenty-five years in various vessels of the Compania Vinuesa and Compania Segovia as boatswain for the former and as seaman for the latter.

[fol. 320] I also remember that a shipment of olives in casks was sent by railway for lack of space on board. I saw the shipmnet on the wharf before it was shipped on the "Mogador."

Answer of Garcia. A steam vessel of 500 cubic meters of cargo capacity and of 460 tons register in fairly good condition, sailing throughout the year between Seville and Cadiz in the transportation of general cargo. It has one deck, two holds, two hatchways with tween decks in the bow. The decks are made of wood and sides of iron. I have been working on the "Mogador" about fourteen years, or since the establishment of this service.

Fourth Interrogatory. If you state in answer to the second interrogatory that you were employed on the S. S. "Mogador" in the months of October and November, 1917, please state whether you recollect three shipments of certain merchandise said to consist, one of 100 casks of olives consigned by Joseph Y. de Terry for shipment to E. Sanchez & Co. of New York, another of 158 casks of olives consigned by Rowlett & Pyman for shipment to Austin Nichols & Co. of New York, and the third of 69 casks of olives consigned by Rowlett & Pyman for shipment to Austin Nichols & Co. of New York by the S. S. "Mogador" and S. S. "Isla de Panay" in October, 1917. If yea, did you see said merchandise when it was presented for shipment by the consignors and before it was loaded into the S. S. "Mogador"?

[fol. 321] Answer of Montiel. I remember, although vaguely, that in the month of October, 1917, the "Mogador" took an almost full cargo of olive casks for New York, but I do not remember the names of the shippers of these casks.

Answer of Garcia. Yes. I remember it vaguely as well as one of the shipments composed of 69 casks of olives was shipped in my presence by rail from Seville to the Trocadero due to lack of space on the "Mogador."

Fifth Interrogatory. If you state in answer to the fourth interrogatory that you recollect said shipments of merchandise and that you saw the same when presented for transportation and before they were loaded on the S. S. "Mogador," please state whether said merchandise was contained in casks and if so describe fully the condition and appearance of said casks at the time that you saw them, mentioning especially (a) the condition and appearance of the staves of the casks; (b) the condition and appearance of the hoops of the casks; (c) the condition and appearance of the heads of the casks; (d) whether the brine was leaking from any of the said casks; (e) whether the casks appeared to be old or new; and (f) whether the casks were re-coopered or repaired upon the dock before being loaded upon the "Mogador." In your opinion were these casks sufficiently strong for shipping the merchandise in question to New York City.

[fol. 322] Answer of Montiel. It was in effect, contained in casks.

They were defective in the sense that they were used, with rusted hoops and some of them were leaking. But these were repaired on the wharf by the shippers' coopers before being loaded. It is my opinion that these containers did not guarantee safe arrival of the goods at the port of destination. I cannot give any more information in this respect.

Answer of Garcia. Yes. It was contained in casks and all of them, those shipped on the "Mogador" as well as those shipped by rail had the same defects, i. e., that the containers were deficient, offering little guarantee of their good arrival in New York. (a) Old and weak. (b) Rusted and thin. (c) Bad. (d) Yes. (e) Old. (f) Yes. Before they were shipped.

Sixth Interrogatory. If in answer to the fourth interrogatory you state that this merchandise was presented for shipment from Seville to New York, please state whether said merchandise was taken on board the "Mogador" and whether you were in charge of its stowage, or took part in the stowage in any capacity. If yea, please state whether said casks were loaded on the "Mogador" from the dock or from lighters; whether they were loaded on board the "Mogador" by slings or otherwise, and if by slings, how many casks were carried in a sling at a time, and how each cask was held in place in the sling, whether upright or upon its bilge.

[fol. 323] Answer of Montiel. These goods were taken, in effect, by the "Mogador" from the wharf for direct trans-shipment at Cadiz to the S. S. "Isla de Panay." These operations were made, as usual, with slings, one by one on their bilges and guided from the shore. The stowing of this cargo was directed by the foreman, Diego Garcia, and inspected by me and the Captain of the vessel.

Answer of Garcia. Yes. I took part in the accepting of the cargo and directed its loading and stowing on the "Mogador" in which vessel it was shipped direct from the wharf with slings, one at a time and on their sides guided by ropes from ashore.

Seventh Interrogatory. If in answer to the Sixth interrogatory you state that you were in charge of the stowage of the said merchandise upon the steamship "Mogador" or took part in it in some capacity, please state what experience you have had in stowing barrel cargoes in vessels and describe fully how the casks containing the merchandise in question were stowed in the "Mogador," especially covering the following points: (a) in what holds and parts of the ship were the casks stowed; (b) whether or not the holds were cleaned before the casks were loaded therein; (c) were the casks stowed with the bungs up or down; (d) did the bilges of the casks touch the floor or were there quoins under the casks, and if so how many quoins were under each cask; (e) how many tiers high were the [fol. 324] casks stowed, and if more than one tier high, what was the method of stowage of the second and later tiers, one on four or otherwise; (f) was any other cargo stowed on top of said casks, and if so what was its character, and if contained in barrels or casks, what was the size and weight of said barrels and casks compared with the size and weight of the casks of olives? (g) Was any dun-

nage or lumber used in stowing said casks, and if so what, and how was it used; (g) were any of the casks stowed on deck, and if so state whether stowed on their heads or on their bilges; if on their bilges whether or not quoins were used and how many tiers in height they were stowed, whether they were covered or not, and if so, what said covering consisted of.

Answer of Montiel. The experience derived from my many years' practice in this kind of work. (a) In both holds and on deck. (b) Yes. (c) With the bungs upwards. (d) There were four quoins under each cask in order to prevent their bilges from touching the floor. (e) I am under the impression that the casks were in two tiers, in the two holds and a few casks, I don't remember how many, formed a third tier in one of the holds. I do not remember any further details. (f) No. (g) Yes; with the purpose of separating and securing them in their position as usual. (h) From eighty to ninety approximately which is the amount that can be stowed on [fol. 325] deck. They were on their bilges in one tier and perfectly stowed and quoined besides being covered with planks for the purpose of protecting them and to facilitate the passage of the crew over them.

Answer of Garcia. I have the knowledge of my fourteen years experience in this work. (a) They were stowed in both holds and on deck. (b) Yes. (c) With the bungs up. (d) There were four quoins under each cask preventing the bilges from touching the floor. (e) In two tiers; the second tier being placed on the ends of the first tier, with the exception of the fore hold in which there were through tiers but only about twenty casks were stowed in the third tier. (f) No. (g) Yes. Quoins were used under all the casks (h) Approximately 85 casks were stowed which is the number that can be carried on deck on their bilges with quoins and in one tier. There were planks over the casks in order to protect them and to facilitate the passage of the crew.

Eighth Interrogatory. Where did the "Mogador" take these casks? If your answer is that the "Mogador" took these casks to Cadiz, state whether they were unloaded from the "Mogador" at Cadiz, and whether you supervised the unloading or participated in any way in it. If yea, state how the casks were unloaded, whether by slings or otherwise, and if by slings how many casks were taken in each sling at a time, how said casks were held in the slings, whether up- [fol. 326] right or on the bilge. Were the casks unloaded on a dock, on lighters or directly upon the decks of the "Isla de Panay?" If you state they were unloaded upon lighters, please describe the length, breadth, depth and general condition of said lighters, whether they had holds, and were covered or not, and if you observed how the casks were stowed on said lighters state the method of stowage, whether upon bilge or upon the head, and in how many tiers they were stowed; if stowed upon the bilge, whether they were stowed bung up or bung down, and whether or not quoins were used.

Answer of Montiel. To Cadiz, delivering them directly to the "Isla de Panay" the transshipment being made by me. The casks

were taken from the "Mogador" with the proper tackle of the "Isla de Panay" one by one and on their sides and with slings.

Answer of Garcia. It took 285 casks in Seville for Cadiz to be unloaded directly to the "Isla de Panay." I did not see the unloading as my duties as labor contractor and foreman ended once the goods were loaded and stowed on the "Mogador" in Seville.

Ninth Interrogatory. Did you examine the casks upon unloading them from the "Mogador" at Cadiz or immediately thereafter?

A. If yea, was their condition the same as when you took them [fol. 327] on board the "Mogador," as described in your answer to the Fifth Interrogatory, and if not the same, state in what particulars it varied.

Answer of Montiel. I saw the casks when the "Isla de Panay" took them, their condition being the same as that in which they were when taken by the "Mogador" in Seville.

Answer of Garcia. No, as stated in my answer to question No. 8.

Tenth Interrogatory. Were the casks in question damaged in any way to your knowledge while being loaded in the "Mogador," transported from Seville to Cadiz, or while being unloaded from the "Mogador" at Cadiz, or while upon the lighters?

Answer of Montiel. I do not think they were damaged during any of the operations referred to in this question.

Answer of Garcia. In the loading and stowing of the "Mogador."

Eleventh Interrogatory. If in answer to the Fifth Interrogatory you state that when said merchandise was presented for shipment the casks in which it was contained were in your opinion not sufficiently strong for shipment to New York, please state whether you requested the agent of Compania Trasatlantica at Seville to require letters of guarantee from the consignors. If yea, state whether such letters [fol. 328] were given by the consignors to your knowledge, and if so, whether you ever saw such letters. If yea, state the circumstances under which you saw such letters, and say whether claimants Exhibits 13, 14 and 15 for identification, which the Commissioner will show you, are the letters of guaranty in question, and if so, have them marked as Exhibits by the Commissioner and attached to your answer.

Answer of Montiel. In this respect, I spoke to the captain and the foreman pointing out to them the defective condition of these containers understanding that the agency and the shippers' foreman had been notified regarding it, the only thing I could do. I heard about some letters of guarantee which I did not see as this was not in my province.

Answer of Garcia. No. In view of the old and weak condition of the casks, in my own name and that of the "Mogador's" captain, I informed the agent of their bad condition having understood that the agency had pointed out the necessity of making notations on the bills of lading and that the shippers had offered letters of guarantee to take the place of such notations. I did not see the letters of guarantee as it is not in my province to do so.

Twelfth Interrogatory. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be

[fol. 329] material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Answer of Montiel. I remember that when I was with my vessel alongside the "Isla de Panay" delivering the cargo, I saw the "Isla de Panay" being loaded from lighters with the casks which went by railway to the Trocadero because they could not be shipped on the "Mogador" and I saw that these casks had the same defects as those shipped on the "Mogador." They did not seem to have suffered greater damage by their shipment by rail.

Answer of Garcia. I remember, among other things, to have communicated with the shippers' foreman pointing out to them the defects in the casks they were delivering so that they, at the same time, would inform the owners of the goods and I assured them that the Company would not receive the casks without making notations on the bills of lading.

[fol. 330] Cross-interrogatories to Jose Montiel and Diego Garcia

First Cross-interrogatory. State—

(a) How long prior to October, 1917, you had been engaged in the occupation in which you were then engaged.

(b) In detail, what experience you have had in the preparation and stowage of barrel cargoes.

(c) In particular what experience you have had in the preparation and stowage of casks of olives for shipment from Spain to foreign ports.

(d) Have you ever assisted in putting up olives in casks or seen them so put up?

(e) About how many cargoes of olives in casks have you handled?

(f) On how many steamships have you loaded olives in casks for shipment to the United States?

Answer of Montiel. (a) Approximately seven years. (b)-(c) The experience gained through my many years of practice. (d) No. (e) Many; although I cannot remember the exact number. (f) It is impossible to remember.

Answer of Garcia. (a) Approximately ten years. (b) and (c) The natural knowledge derived from my experience. (d) No. (e) I do not remember them, but they were many. (f) In many, but I cannot remember the number.

[fol. 331] Second Cross-interrogatory. State the name and address of the person, firm or corporation in whose employ you were during October or November, 1917, and in the work you did in or about the Steamship "Mogador" in the loading, stowage or discharge of the shipments of olives mentioned in the Fourth Direct Interrogatory addressed to you; and whether you were in the employ of the owners or agents of the said Steamship or of anyone employed by them.

Answer of Montiel. Delagacion de la Compania Trasatlantica and employed by this Company as boatswain of the "Mogador."

Answer of Garcia. Agency of the Compania Trasatlantica and as labor contractor and foreman for loading and unloading for this agency.

Third Cross-interrogatory. Please state—

(a) How large the casks containing olives were which were loaded on the "Mogador" at Seville in September or October, 1917, consigned to Austin Nichols & Co. or E. Sanchez & Co.

(b) Were they the usual and ordinary casks for containing olives?

(c) Were they of the usual size for olive casks?

(d) Had you ever before seen olives packed in casks as large as these casks?

[fol. 332] (e) How often had you seen casks of that size used to ship olives?

Answer of Montiel. (a) As to all of them—approximately of 1.20 cubic meters. (b)-(c) Yes. (d) Yes. (e) Very frequently.

Answer of Garcia. (a) A size of 1.20 cubic meters approximately and of weight from 700 to 900 kilos. (b) Yes. (c) Yes. (d) Yes. (e) Very frequently.

Fourth Cross-interrogatory. Please state in your experience:

(a) How olives are usually packed?

(b) If you say in casks, what is the usual size of the casks?

(c) Of what wood are they usually made?

(d) What is the best size for an olive cask and why?

(e) What size casks are usually used for transatlantic service?

(f) Of what kind of wood were the casks in which these olives were shipped made?

Answer of Montiel. (a) They are generally packed in casks for shipment to New York. (b) 1.20 cubic meters approximately. (c) Formerly they were made of oak and latterly of chestnut wood. (d) The smaller the better as it is easier to handle them. (e) Of 1.20 cubic meters approximately. (f) Of chestnut wood.

[fol. 333] Answer of Garcia. (a) For New York—in casks generally. (b) It has already been stated in question number 3-(a). (c) Oak used to be used but for a long time casks have been made of chestnut wood especially during the duration of the European war. (d) The smaller the size the better because the smaller casks are more easily handled and stowed. (e) It has already been stated in answer to question number 3-(a). (f) Of chestnut wood.

Fifth Cross-interrogatory. If you state that you had anything to do with the loading or stowage of said shipment of olives at Seville and with the discharging of said shipment at Cadiz in October, 1917, state in detail:

(a) Just what you had to do with same both at Seville and at Cadiz,

(b) On what part of the vessel, lighter, wharf or dock you were working at both Seville and Cadiz,

(c) How long you were on each during the loading or discharging of said vessel at both Seville and Cadiz,

(d) During what hours of the day was the loading done at both Seville and Cadiz,

(e) Whether you were in any of the holds of said Steamship "Mogador," while she was loading at Seville and discharging at Cadiz,

[fol. 334] (f) Whether you were in or on any of the lighters from which said olives were loaded on said Steamship "Mogador" or in or on any of the lighters on which said olives were discharged from the Steamship "Mogador" at Cadiz.

(g) What particular holds you were in on the said Steamship "Mogador" at both places during the said loading and dischar-ing of the said Steamship "Mogador."

(h) During what part of the time you were in said holds.

(i) What particular parts of the lighters you were in and during what time or times you were in each place, both at Seville and at Cadiz.

(j) Just what you were doing in each of said places.

(k) How much of the cargo had been loaded on said Steamship "Mogador" when you were first in said holds of said Steamship and how much when you were last in them at Seville, and how much of said cargo of olives had been discharged from said Steamship "Mogador" when you were first in her said holds and how much when you were last in them at Cadiz?

[fol. 335] (*h*) How much of the cargo had been unloaded from said lighters when you were first in them and how much when you were last in them at Seville and how much had been loaded upon them when you were first in them and how much when you were last in them at Cadiz.

Answer of Montiel. (a) To inspect their careful stowing on board. (b) In the holds, and on the deck of the "Mogador." (c) I do not remember but I was in both places during these operations. (d) From 7 A. M. to 5 P. M. less two hours for lunch. (e) Yes. (f) The "Mogador" did not load or unload from or to lighters. (g) In both. (h) I do not remember. (i-j) The "Mogador" did not load from nor unload to lighters. (k) I cannot remember these details. (l) Lighters were not used.

Answer of Garcia. In Seville, to attend to the loading and stowing which was my duty. I did not go to Cadiz. (b) I was on the wharf, on the deck and in the holds of the "Mogador" in Seville. (c) I was in all these places during these operations in Seville. (d) From seven A. M. to five P. M. with two hours for lunch. (e) Yes. In both while loading. (f) I was not on any lighters as they were not used for this shipment. (g) In the two holds throughout the loading. (h) I do not remember. (i) Lighters were not used. (j) To inspect and direct the loading and stow-[fol. 336] ing. (k) I was in the holds of the "Mogador" in Seville various times but I cannot state the exact quantity of cargo loaded at the time of my visits. (l) The cargo of the "Mogador" was not unloaded nor taken from lighters.

Sixth Cross-interrogatory. Did you make personally, an inspection of the casks of the said shipment and ascertain the facts you have mentioned in your answers to the Fifth Interrogatory? If you did, describe exactly what examination you made. Can you say, of your own knowledge, as to these casks before they were loaded on the "Mogador at Seville—

(a) Whether any of the heads were broken?
(b) Whether any of the hoops were broken?
(c) Whether any of the staves or heads were warped?
(d) Whether the brine was leaking from any of them, and if so, from how many and to what extent?
(e) Whether the brine leaked from any of the casks while they were standing still, or only while they were being moved?

Answer of Montiel. (a-e) I cannot remember the details regarding the conditions of the casks, only that their general bad shape [fol. 337] attracted my attention while they were on the wharf, also I communicated the bad impression they made on me to the captain and the foreman of the "Mogador".

Answer of Garcia. (a) Not broken but they were warped and leaking. (b) Some of them were broken but they were replaced bofore shipping. (c) Yes. (d) Yes, but I cannot say the exact number. (e) They leaked more when they were moved.

Seventh Cross-interrogatory. If you say that you examined the said casks, state particularly—

(a) Whether you were ordered to do so, and if so, by whom.
(b) How long, to your knowledge, had the casks been in the place where you examined them before you did so.
(c) How many men assisted you in the making of such examination.
(d) What examination did you personally make of these casks.
(e) Exactly how many casks you personally examined.
(f) The manner of your examination.
1. Did you test the casks in any way?
2. Exactly what tests did you make to test their soundness.
3. Did you test the heads and hoops?
[fol. 338] 4. Were the hoops rusty?
5. If so, were they very rusty, and did you scrape any of the rust off?
6. Did any of the hoops break when you examined them, and if so, which hoops, and how many of the casks?
(g) Did you move any of the casks in making your examination? If so, in what way and for what purpose?
(h) If you say in answer to the Fifth Interrogatory, that the casks were not sufficiently strong for shipping olives to New York, state exactly in what respect they were inadequate and on what you base your opinion. What tests did you apply to ascertain this? Or do you base your opinion merely on observation?
(i) What examination did you make of the barrels?
(j) In detail, what casks do you claim that you saw.

(k) If you know, were the casks which you saw being used for the first time on this trip.

(l) If not, how long had they been in use?

(m) How do you know they had been so long in use?

(n) Did you examine each barrel and cask to see about its condition?

[fol. 339] (o) Where were the casks when you examined them?

Answer of Montiel. (a-o) It is impossible for me to remember the details mentioned in these questions but I can assure you my conviction of their bad condition is based on what I saw added to my long experience with this kind of container.

Answer of Garcia. (a) It is a part of my duty. (b) I do not remember. (c) I do not remember whether anyone assisted me. (d) Ocular inspection. (e) I do not remember. (f) 1 to 6. The looking over of these casks coupled with my long experience in such matters assured me that they were in bad condition. (g) They were continuously being moved in front of my eyes while they were being handled and transported on the wharf. (h) The bad condition of these casks was clearly seen on moving them and on seeing their warped heads and staves, rusty and thin hoops and the leaking which the shippers' coopers tried to stop. (i) No barrels were shipped. (j) It is impossible to remember their number. (k) No. (l) It is impossible to say how long. (m) I do not know how long they had been in use. (n) I examined many casks but I am unable to state just how many. (o) On the wharf.

Eighth Cross-interrogatory: Did you make any examination of the casks on the trip from Seville to Cadiz or on arrival at Cadiz; if [fol. 340] so state particularly, specifying the time and place:

(a) How long, to your knowledge, had the casks been in the place where you examined them before you did so.

(b) How many men assisted you in the making of such examination.

(c) Exactly how many casks you personally examined.

(d) The manner of your examination.

(e) Did you test the casks in any way?

(f) Exactly what tests did you make to test their soundness?

(g) Did you test the heads and hoops?

(h) Were the hoops rusty?

(i) If so, were they very rusty, and did you scrape any of the rust off?

(j) Did any of the hoops break when you examined them, and if so, which hoops, and on how many of the casks?

(k) Did you move any of the casks in making your examination? If so, in what way and for what purpose?

(l) Where were the casks when you examined them?

Answer of Montiel. (a-b) During the voyage from Seville to [fol. 341] Cadiz I did not make any examination of the casks it being impossible to do so due to the fully loaded condition of the vessel. With reference to Cadiz, I can only say that when they were de-

livered to the "Isla de Panay" their condition was neither better nor worse than that in which they were shipped in Seville.

Answer to Garcia. No.

Ninth Cross-interrogatory: Did you see the said casks hoisted from the said lighters and lowered into the hold of the said Steamship "Mogador" at Seville? If yes, please state:

(a) How the tackle slings were attached to said casks.

(b) How said casks rested in said slings.

(c) Whether any of the said casks broke or were strained to your knowledge while being so hoisted or lowered and if so in what manner they were broken or strained and how many were broken or strained.

(d) Whether any of the casks came in contact with anything after they left the lighter's hold and before they reached the bottom of the hold of the "Mogador" and if so, with what they came in contact and how many so came in contact with anything.

[fol. 342] (e) How the slings were worked; if by a steam winch, describe exactly how it was done.

(f) Exactly how the casks were lifted from the lighters, guided into place and lowered.

(g) How many men handled each cask in removing them from the slings.

(h) If any of the casks were broken, whether they were recoopered or repaired and if so how many casks were so repaired, and exactly what work was done on them; when the work was done; how it was done and by whom it was done.

Answer of Montiel. (a-h) They were not loaded to nor unloaded from lighters by the "Mogador".

Answer of Garcia. They were not taken from lighters to the "Mogador".

Tenth Cross-interrogatory. Did you see the casks of olives in said shipment hoisted from the hold of the S. S. "Mogador" and lowered upon the lighters at Cadiz? If yes, please state:

(a) How the tackle slings were attached to said casks.

(b) How said casks rested in said slings.

(c) Whether any of the said casks broke or were strained to your [fol. 343] knowledge while being so hoisted or lowered and if so in what manner they were broken or strained and how many were broken or strained.

(d) Whether any of the casks came in contact with anything after they left the place where they had been stowed in the hold of the S. S. "Mogador" and before they reached the hold or deck of the lighter, and if so, with what they came in contact and how many so came in contact with anything.

(e) How the slings were worked; if by a steam winch, describe exactly how it was done.

(f) Exactly how the casks were lifted from the S. S. "Mogador," guided into place and lowered in the lighters.

(g) How many men handled each cask in removing them from the slings.

(h) If any of the casks were broken, whether they were recoopered or repaired and if so how many casks were so repaired, and exactly what work was done, on them, when the work was done; how it was done and by whom it was done.

Answer of Montiel. (a-h) They were not taken by lighters from the "Mogador."

Answer of Garcia. No.

[fol. 344] Eleventh Cross-Interrogatory. (a) Is it part of your duty to examine cargoes presented for shipment?

(b) Is it part of your duty to make reports thereon?

(c) If you make such reports, to whom do you usually make them?

(d) Is such report usually in writing or oral?

(e) Did you call the attention of the shippers at Seville to the condition of these casks?

(f) Did you call the Captain's attention to it?

(g) Did you have any conversation with anyone else on the subject?

(h) If so, repeat it as well as you can remember it.

Answer of Montiel. (a-b) It is one of my duties to see how the cargo is received, stowed, and delivered. (c-d) I report verbally to the captain of the vessel. (e) That was not my duty. (f) Yes. (g-h) No.

Answer of Garcia. (a) Yes. (b) Yes. (c) I gave them by word of mouth to the captain of the vessel, to the agent and to the foreman who present the cargo for shipment. (d) Verbally. (e) Yes, through their foremen. (f) Yes. (g) and (h) I do not remember to have had any conversation but with the persons referred to in answer (c) of this question.

[fol. 345] Twelfth Interrogatory. Were the casks loaded in the holds or on the decks of the lighters in Seville and in how many tiers were they loaded in the said lighters? Were they loaded in the holds, or on the decks of the lighters at Cadiz and in how many tiers were they loaded in the said lighters?

Answer of Montiel. There were no lighters used.

Answer of Garcia. The casks taken by the "Mogador" were not loaded from lighters.

Thirteenth Cross-interrogatory. What was the freeboard of the lighters at Seville from which the olives were loaded on the "Mogador" before any olives were unloaded from them?

Answer of Montiel. There were no lighters used.

Answer of Garcia. Lighters were not used in loading the "Mogador."

Fourteenth Cross-interrogatory. What was the freeboard of the lighters at Cadiz after they were fully loaded with the olives from the S. S. "Mogador"?

Answer of Montiel. There were no lighters used.

Answer of Garcia. I do not know as I did not go to Cadiz.

[fol. 346] Fifteenth Cross-interrogatory. (a) To whom did the lighters from which the olives were loaded upon the "Mogador" at Seville belong?

(b) By whom were they operated?
(c) Under whose control were they?
Answer of Montiel. There were no lighters used.
Answer of Garcia. (a), (b) and (c) No lighters were loaded in Seville.
Sixteenth Cross-interrogatory. (a) To whom did the lighters upon which the olives were loaded from the lighters at Cadiz belong?
(b) By whom were they operated?
(c) Under whose control were they?
Answer of Montiel. There were no lighters used.
Answer of Garcia. (a), (b) and (c) I do not know as I did not go to Cadiz.
Seventeenth Cross-interrogatory. If you stated that any of the casks broke at Seville or Cadiz, please answer the following:

(a) Did the casks which broke at Seville, break as they were being [fol. 347]raised from the lighter to be loaded on the "Mogador," if so, how many casks then broke?
(b) Did they break while they were being lowered into the "Mogador"? If so, how many casks then broke?
(c) Did they break when they reached the hold of the "Mogador" and came to rest there as they were lowered into the "Mogador"? If so, how many casks then broke?
(d) Did they break after they reached the hold of the "Mogador"? If so, how many casks then broke?
(e) Did any casks break as they were being raised from the hold of the "Mogador" at Cadiz? If so, how many casks then broke?
(f) Did any casks break while they were being lowered into the lighter at Cadiz? If so, how many?
(g) Did any of the casks break when they reached the deck of the lighter at Cadiz? If so, how many, and what was the cause of their breaking?
(h) Did you actually see all the casks break which you have stated did break?
(i) Did you actually see any of the casks break which you have stated did break? How many?
[fol. 348] Answer of Montiel. (a-i) I do not remember that any casks broke.
Answer of Garcia. (a) to (i) I do not remember whether any casks broke.
Eighteenth Cross-interrogatory. If any of the casks leaked at Seville, please answer the following:

(a) 1. Did any of the casks leak as they were raised from the lighter to be lowered into the hold of the "Mogador" at Seville?
2. How much did they leak?
3. How many casks leaked?
(b) Did any of the casks leak while being lowered into the "Mogador"—how many so leaked?
(c) Did any of the casks leak while being lowered upon the lighters? How many so leaked?
(d) Did you actually see any liquid running from any of these

casks at Seville while being raised from the lighters or lowered into the "Mogador"?

(e) Did any of the casks leak while they were standing still, or did they leak only when they were being moved? To exactly what extent did they leak when standing still or when being moved?

[fol. 349] (f) State exactly to what the leaking was due in each case?

(g) Is it not a fact that there is always more or less leakage from olive casks?

Answer of Montiel. (a-g) I remember that they were leaking while on the wharf at Seville and that they were repaired by the shippers' coopers, there being no leakage while they were being taken aboard and stowed. I do not remember any more of the details mentioned in this question.

Answer of Garcia. (a) 1 to 3. They were not taken from lighters at Seville. (b) I do not remember although I do not think so. (c) They were not lowered onto lighters. (d) They were not taken from lighters. (e) Many of them leaked while on the wharf much more so when they were moved but they were repaired by the shippers' coopers before shipping. (f) I cannot remember exactly but undoubtedly the leaking was due to the hoops being loose and the fact that the staves were not tight. (g) Frequently in containers made of chestnut wood.

Nineteenth Cross-interrogatory. If any of the casks leaked on the voyage from Seville to Cadiz, please answer the following:

(a) How many cases then leaked?

(b) How much did each such cask leak?

(c) Were the casks which leaked moved at all in the hold during this trip?

[fol. 350] (d) Did any of the casks leak while they were standing still, or did they leak only when they were being moved? To exactly what extent did they leak when standing still or when being moved?

(e) State exactly to what the leaking was due in each case.

Answer of Montiel. (a-e) I saw no leaking and evidently there was none as there were no leaks when these casks were delivered to the "Isla de Panay."

Answer of Garcia. (a to e) I did not go in the vessel from Seville to Cadiz.

Twentieth Cross-interrogatory. If any of the casks leaked at Cadiz, please answer the following:

(a) Did any of the casks leak as they were raised from the "Mogador" to be lowered upon the lighters? How many casks then leaked? How much did they leak?

(b) Did any of the casks leak while being lowered upon the lighters? How many so leaked?

(c) Did you actually see any liquid running from any of these casks at Cadiz while being raised from the "Mogador" or lowered upon the lighters?

[fol. 351] (d) Did any of the casks leak while they were standing still, or did they leak only when they were being moved? To ex-

actly what extent did they leak when standing still or when being moved?

(e) State exactly to what the leaking was due in each case.

Answer of Montiel. (a-d) I saw no leaking when they were delivered at Cadiz to the "Isla de Panay."

Answer of Garcia. (a to e) I did not go to Cadiz.

Twenty-first Cross-interrogatory. Were the bilges on the "Mogador"?

(a) Sounded on the trip from Seville to Cadiz? If you say that they were sounded, please state,

(b) When they were sounded,

(c) How often they were sounded,

(d) What was found in the bilges?

(e) How much water was found at each sounding,

(f) Was there any olive brine found in them, and if so, how much?

(g) How often were the bilges pumped out?

(h) On other trips, how often were the bilges sounded, how much [fol. 352] water was found in them and how often were they pumped out?

(i) Did you watch constantly to see what was coming from the bilges?

(j) How do you know whether any olive brine was or was not in the bilges?

Answer of Montiel. (a-j) The sounding of the bilges, as usual, was made before sailing from Bonanza, at the mouth of the Guadalquivir River, to the sea and nothing abnormal was noticed.

Answer of Garcia. I did not go in the vessel to Cadiz.

Twenty-second Cross-interrogatory. State, if you know, from whom the casks in which said olives were shipped at Seville were obtained by the person who packed and shipped said olives.

Answer of Montiel. I do not know.

Answer of Garcia. I do not know.

Twenty-third Cross-interrogatory. If you saw the loading of the casks of olives in this action into the "Mogador" at Seville, please answer the following:

(a) Did you go aboard either said ship or said lighters?

(b) How many times did you go aboard said "Mogador" or said lighters?

[fol. 353] (c) Did you stay on the deck of said "Mogador" or of said lighters or either of them?

(d) Did you go into the lower hold of said "Mogador" or into the hold of said lighters or either of them?

(e) Did you stay on the deck and look into the hatchway of said "Mogador" or of said lighters or either of them?

(f) If you did not go into the hold, how much of said hold could you see from the hatchway?

(g) Did you go into the hold of said "Mogador" or of said lighters after they were partly loaded?

(h) Did you make a special trip into the hold of the "Mogador" to look at the dunnage?

(i) Why did you take so much interest in the dunnage?
(j) How *it is* that you can remember this particular dunnage, planks, wedges, chocks or quoins after more than two years?
(k) Did you examine the dunnage, chocks or quoins in every ship on which you worked since October, 1917?
(l) On how many ships have you stowed olives since 1916?
[fol. 354] (m) On how many steamers have you examined the dunnage, chocks, quoins and stowage of olives since October, 1917?
(n) Did you see each cask in this case, stowed on said "Mogador" or said lighters?
(o) How can you now recollect the stowage on said "Mogador" or said lighters?

Answer of Montiel. (a) On board of the "Mog-dor." (b) I did not leave the "Mogador" during these operations. (c-e) On deck and in the holds of the "Mogador" and looking through the hatches. (f) The holds could be seen almost entirely from the hatches. (g) Yes, into those of the "Mogador." (h) I do not remember but it was my custom to do so always. (i) I took only the interest I usually take. (j) It is easy for me to remember what was done as I always do the same thing in every trip I make in the "Mogador." (k) I have seen and examined them very frequently. (l-m) I do not remember. (n) Many, but I do not remember the number. (o) Because in this case, the cargo consisted almost entirely of casks of olives which is very rare, and also, because such stowage is usual.

Answer of Garcia. (a) Yes. On board the "Mogador." (b) Many but I cannot remember how many times. (c) Yes; on the deck of the "Mogador." (d) Yes, at different times to the holds of the "Mogador." (e) Yes; on the deck of the "Mogador" and I looked [fol. 355] through the hatchways into the holds. (f) I went into the holds although from hatchways, most of them could easily be seen. (g) Yes. To the holds of the "Mogador." (h) Yes, several. (i) I always take interest as it is a part of my duty. (j) Because this is common to all shipments. (k) Not all of them, but the greater part. (l) On the "Mogador" [illegible] and the "Joaquin Pielago" which sometimes took her place. (m) On the "Mogador" and the "Joaquin Pielago." (n) All of them on the "Mogador." (o) Because this is the way in which it is always done.

Twenty-fourth Cross-interrogatory. If you saw the loading of said casks involved in this action from the SS. "Mogador" to the lighters at Cadiz, please answer the following:

(a) Did you go aboard said lighters at Cadiz or any of them? How many did you go aboard, and how often did you go aboard them?
(b) Did you stay on the decks of said lighters or either of them?
(c) Were the olives loaded on decks or below decks on said lighters?
(d) Did you go into the lower hold of said lighters or any of them?
(e) If you did not go into the hold, how much of said hold could you see from the hatchway?

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[fol. 356] (f) Did you examine or observe the dunnage of said olives on said lighters? If so describe it in detail?

Answer of Montiel. They were not put into lighters in Cadiz nor were they taken from lighters in Seville.

Answer of Garcia. (a to f) I did not go to Cadiz.

Twenty-fifth Cross-interrogatory. State with detailed reference to the casks of olives as loaded on the lighters at Seville, on the S. S. "Mogador" and on the lighters at Cadiz:

(a) Whether you actually saw the bottom tier of casks put in place in any of the holds of the "Mogador" or on any of said lighters?

(b) In which of the said holds and on which of the said lighters at Seville and Cadiz you actually saw the bottom tier of casks only in place.

(c) Whether you saw the completed load in place in any of the holds or in any of the lighters, and if so, in which holds or which parts of said lighters.

(d) In how many tiers were the casks loaded—

1. In the "Mogador."
2. On the lighters at Seville.
3. On the lighters at Cadiz.

[fol. 357] 4. Were the casks loaded all on deck or below decks or partly on and partly below decks.

Answer of Montiel. They were not put into lighters in Cadiz nor were they taken from lighters in Seville.

Answer of Garcia. (a) Yes, in the holds of the "Mogador." (b) In the holds of the "Mogador" and on deck." (c) Yes, in the holds and on the deck of the "Mogador." (d)-1. In two tiers with the exception of approximately 20 casks which were stowed in a third tier in the hold aft. (2) They were not taken from lighters at Seville. (3) I did not go to Cadiz. (4) Approximately 200 in the holds and 85 on deck.

Twenty-sixth Cross-interrogatory. If there were blocks, chocks or quoins beneath the casks in any of the holds of the Steamship "Mogador" or of said lighters at Seville or at Cadiz, particularizing as to the Steamship of the said lighters, state:

(a) How far from the ends of the casks such blocks or chocks were placed.

(b) Whether blocks or chocks were placed under the end of every cask in the bottom tier.

(c) If your answer to the last question is in the affirmative, state how you could see all of the said chocks or blocks.

[fol. 358] (d) Whether any other cargo was towed on top of the said casks, and if so, what cargo.

(e) What was placed between the upper and lower tier of casks, and between the casks and any cargo that was placed on top of them. Describe how this was done.

(f) Whether there were any blocks or chocks on or under any part of the casks, other than the ends of those in the lower tier, and if so, in which holds they were and where they were placed as respects the casks and on which tier they were placed.

Answer of Montiel. (a-c) In this, as in all shipments of casks, the blocks and chocks were placed so that the bilges of the casks should not touch the floor and also to prevent any movement, which placing I personally supervised. I do not remember any further details in this respect. (d) No. (e) No cargo was stowed between these casks nor under nor on any of the tiers. (f) The casks of all tiers were secure and separated from each other by chocks and quoins placed at their ends.

Answer of Garcia. (a) Nearly in the center of the casks. (b) Yes. (c) I was noticing them while they were being placed. (d) No. (4) There was no other cargo but casks as the few boxes of garlic which were also shipped were stowed in the peak of the bow. (f) Yes, there were quoins.

[fol. 359] Twenty-seventh Cross-interrogatory. (a) When the lighters were unloaded at Seville, were all the casks of olives and the cargo above them in place?

(b) Was any of the other cargo loose or moved from its place? If yes, describe exactly what had happened.

(c) Had any of the hoops come off any of the casks when they were unloaded at Seville? If so how many?

(d) Were these casks recoopered? If so, in what way?

(e) Had any of the olives in any of the casks come out of the casks to your knowledge, by the time the casks were loaded on the "Mogador" at Seville?

(f) From how many casks had olives so come out?

(g) How much of the olives had so come out of the casks?

Answer of Montiel. (a-g) They were not taken from lighters at Seville.

Answer of Garcia. (a to g) They were not unloaded from lighters but taken direct from the wharf.

Twenty-eighth Cross-interrogatory. Please answer the following questions as to the discharging of the olives by the S. S. "Mogador" [fol. 360] at Cadiz:

(a) Were all the casks of olives and the cargo above them in place when the hatch coverings were removed and throughout the whole period while the cargo was discharged?

(b) Was any of the other cargo loose or moved from its place? If yes, describe exactly what had happened.

(c) Had any of the hoops come off any of the casks when they were unloaded at Cadiz? If so, how many?

(d) Were these casks recoopered? If so, in what way?

(e) Had any of the olives in any of the casks come out of the casks to your knowledge, by the time the casks were loaded on the lighters at Cadiz?

(f) From how many casks had olives so come out?

(g) How much of the olives had so come out of the casks?

Answer of Montiel. (a) Yes, but there was no cargo on the casks. (b) There was no other cargo on this trip than a few bundles of garlic which were stowed in the peak of the bow. (c-d) I do not remember. (e-g) No.

[fol. 361] Answer of Garcia. (a to g) I did not go to Cadiz.

Twenty-ninth Cross-interrogatory. Please state whether there were any fore and aft or athwartships boards or planks used as dunnage on the "Mogador" for these casks of olives, and if you know, state:

(a) Upon what the ends of these planks rested in each hold.

(b) Upon what the parts of the said planks between them were rested in each hold.

(c) Whether any of the said planks rested on the bilges of the said casks and if so, just where they were located.

(d) Whether the casks on which the said planks rested were standing on end or lying on their bilges in each of the holds.

(e) Whether there were any casks on top of said planks and, if so, whether they were standing on end, or lying on their bilges.

(f) Just how the casks that were standing on end were dunnaged in each of the holds.

(g) Whether the boards or planks were fastened in any way, and if so, describe in detail how and to what they were fastened in each hold.

(h) Whether there were two or more tiers of casks, whether there [fol. 362] were boards or planks between them, and if so, whether said planks rested on the ends or on the bilges of the casks, and whether the ends or bilges of the casks rested on the planks beneath them.

Answer of Montiel. (a-e) These planks rested on blocks placed on the ends of the casks in order to prevent damage while rolling other casks into position and were removed as soon as these second and a few third tier casks were stowed. (d) They were lying on their bilges. (e) These planks, as already stated, were removed as soon as the casks were stowed. (f) No casks were stowed standing on end. (g) The planks were not fastened. (h) There were two tiers of casks and a few casks in a third tier in the aft hold.

Answer of Garcia. (a-h) Boards and planks were not used, only quoins between all the tiers of casks.

Thirteenth Cross-interrogatory. With reference to the planks, if any, as dunnage, on the Steamship "Mogador," please state—

(a) Whether the planks cleared the bilges of the casks below them.

(b) What distance there was between the planks and the bilges of the casks.

(c) Did you make any actual examination to see if these planks cleared the bilges of the casks?

[fol. 363] (d) How did you make such examination?

(e) Was there any cargo stowed between the top tier of barrels and the deck of the steamer or above the top tier of barrles on the lighters?

(f) If so, how much space was left in the steamer between the top tier of casks and the deck above in each hold?

Answer of Montiel. (a-f) No planks were used between the tiers after the stowage was completed but only the four quoins or chocks which I have mentioned.

Answer of Garcia. (a to f) The boards and planks were used for rolling the casks to second and third tiers and were taken away after the cargo was stowed.

Thirty-first Cross-interrogatory. Were any of the casks of olives and the deck of the steamer or above the top tier of barrels on the Steamship "Mogador" at Seville, and if so—

(a) Where were they so stowed?

(b) In which holds and which parts of the holds were they so stowed?

(c) How many were so stowed?

(d) In how many tiers were they stowed in each place in which they were stowed?

(e) What was stowed under said casks in each place?

[fol. 364] (f) What was stowed above said casks in each place.

Answer of Montiel. (a-f) They were not taken from lighters at Seville.

Answer of Garcia. (a to f) The casks were not stowed on end.

Thirty-second Cross-interrogatory. If in stowing said olives in the said Steamship "Mogador" at Seville or on said lighters at Seville or on said lighters at Cadiz there were no boards or planks used in any places, state in which holds or places there were no such boards or planks used.

Answer of Montiel. All the casks, as usual, had their corresponding quoins or chocks.

Answer of Garcia. Planks and boards were not used in stowing.

Thirty-third Cross-interrogatory. Annex to these interrogatories diagram showing just how the tiers of casks were stowed on top of one another in each of the holds of the Steamship "Mogador" and also on the lighters at Seville and Cadiz, giving a side view, top view and end view, and indicating on the said diagram where the dunnage was placed and what it consisted of, and just how it was placed and indicate if any blocks or quoins were placed elsewhere than beneath the casks.

[fol. 365] Answer of Montiel. I do not know how to draw.

Answer of Garcia. I do not know how to draw.

Thirty-fourth Cross-interrogatory: State, if you know, who owned or controlled the quay at Seville on which these olives were stowed before they were placed on board the Steamship "Mogador"?

Answer of Montiel. The "Junta de Obras del Puerto de Seville".

Answer of Garcia. The Board of Port Works of Seville.

Thirty-fifth Cross-interrogatory: State, if you know whether any objections were made to the casks in which said olives were shipped or whether any objections were made to receiving them on board said lighters or said "Mogador" and if so, please state:

(a) Whether you personally heard any of the alleged objections made;

(b) If so, to whom the alleged objections were made;

(c) Who made the alleged objections;

(d) Did you personally make any of the alleged objections? If

so, state exactly what you said and to whom you made said objections and what was said to you in reply.

[fol. 366] (e) What did the alleged objections consist of, that is, exactly what did you hear said?

(f) Do you know by whom the man to whom said objections were made was employed? If yes, state by whom he was employed, and how you know this.

(g) In what capacity was the man to whom the said objections were made employed? How do you know this?

(h) To how many men were the said objections made?

(i) Give the names of all persons to whom said objections were made, and state, if you know exactly what was said to each one and exactly what he said in reply.

(j) If any of said alleged objections were made in writing please attach copies thereof hereto, or state why you cannot do so.

Answer of Montiel. (a) Regarding the objections made on account of the conditions of the casks, I only remember to have made suggestions to the captain of the "Mogador" and the foreman about this matter, having understood that notations on the bills of lading or, certain documents to take their place, were demanded in order to release the company from responsibility. I did not interfere in this matter as it was not in my province to do so.

Answer of Garcia. (a) The captain of the "Mogador" and I my-[fol. 367]self made them. (b) To the foreman of the shippers and to the agent. (c) Myself and the Captain. (d and e) Yes, the substance of what I said to the foreman and to the agent was that the casks were in such bad condition as not to be accepted without notation; I cannot remember any other details. (f) By the shippers. (g) Foreman. (h) To all the foremen of said shippers. (i) After the time that has elapsed I can remember neither names nor more details. (j) They were made by word of mouth as usual.

Thirty-sixth Cross-interrogatory: Please state:

(a) How many shipments of olives have you seen shipped from Seville in bad order and condition?

(b) Did you see any of the bills of lading and receipts given for each one of such consignments, and see what notations were made on them?

(c) If so, what notations were made on said bills of lading, or receipts?

(d) Upon what and how many bills of lading or receipts were such notations made?

(e) By whom and by what steamship line were such shipments made?

Answer of Montiel. (a) A few, but I cannot remember how many. (b-d) I never saw any bills of lading, such not being part of my duties. (e) I do not remember.

[fol. 368] Answer of Garcia. (a) I cannot remember. (b to e) This not a part of my duties.

Thirty-seventh Cross-interrogatory. If you gave any receipts or other papers or documents for any of the said olives in this case, please annex copies hereto.

Answer of Montiel. I did not give any document.

Answer of Garcia. No.

Thirty-eighth Cross-interrogatory. If you signed any papers or documents for or in connection with said shipment of olives—

(a) Did you ask for or receive any letters of guarantee or other similar agreement before so signing such papers for said shipments?

(b) were any demands made by you, or by any one else, to your knowledge, for letters of guarantee before signing any receipts or bills of lading for said olives. If so what such demands were made, by whom, and to whom were they made. Were they made to you or by you or in your hearing?

(c) State exactly what was said to you or in your hearing concerning such guaranties.

(d) Did you see any such guaranties?

(e) Did you see them given. If so to whom and by whom were they given?

[fol. 369] (f) In whose possession did you see them?

(g) Did you see the letters signed?

(h) Do you know the handwriting or signatures on them? If so, who wrote or signed them?

(i) What was done with such guaranties?

(j) What, if you know, was the purpose of giving or obtaining such letters of guarantee?

Answer of Montiel. (a-j) I did not sign any document as that is not part of my job.

Answer of Garcia. (a to j) No. I neither signed nor saw any documents of this shipment as this is not part of my duties; but I remember having heard that the shippers offered certain letter of guarantee to take the place of notations on the bills of lading.

Thirty-ninth Cross-interrogatory. Describe exactly and in detail the weather, wind and sea you encountered after leaving the Guadalquivir River until you reached Cadiz, using the Beaufort Scale to indicate the velocity of the wind. Did the ship roll?

Answer of Montiel. (a) I only remember the weather was good.

[fol. 370] Answer of Garcia. I did not go to Cadiz on the "Mogador".

Fortieth Cross-interrogatory: (a) How have you been able to keep clear in your mind all the facts concerning which you have testified in answer to the Direct Interrogatories and these Cross-Interrogatories?

(b) Have you made a written statement in this case?

(c) If so, to whom did you give such statement and where is it now, if you know?

(d) Annex such statement or a copy thereof to your answers to these Interrogatories.

Answer of Montiel. (a) As can be seen by my answers, I can only remember part of what happened in this shipment and that part only by effort; also because the operations, etc. in connection with this shipment are almost identical with the usual ones. Furthermore, as stated above, I remember this shipment especially as it consisted almost entirely of casks of olives which is rare. (b-c-d) No.

Answer of Garcia. (a) Because the procedure followed by me are identical in all shipments and it happens that this shipment was composed almost entirely of casks, which rarely occurs, and which fact has helped me greatly in remembering. (b to d) I did not make any statement in writing.

[fol. 371] Forty-first Cross-interrogatory: (a) Have these Cross Interrogatores been communicated to you either in form or substance prior to the time of your giving your testimony in this action?

(b) If so, state by whom they have been communicated to you and how.

(c) Have you had any communication with anyone concerning the testimony you should give on this occasion, and if so, with whom?

(d) If so, what was then said to you in that connection?

(e) Have you refreshed your recollection as to anything you have testified to in answer to these Interrogatories, if so, how have you done so?

Answer of Montiel. (a-d) No. (e) No. I have relief only on my recollection of what took place inasmuch as I live so far away from the persons and things which might help to refresh my memory.

Answer of Garcia. (a to d) No. (e) I have reconstructed the facts as they were recalled by me.

Forty-second Cross-interrogatory. If any of your answers to any of these Direct or Cross Interrogatories are based on information [fol. 372] given to you by others or statements made to you, state which of your said answers are so based.

Answer of Montiel. These answers are based only on my recollection.

Answer of Garcia. No.

Diego Garcia.

Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness, this twenty-fifth day of January, 1922, before Robert Harnden, Consul of the United States of America. Fernando Juan, Interpreter. Clifford W. McGlasson, Witness.

Fee No. 38—Fee for taking deposition, 1,740 words	$16.50
Fee No. 39—Fee for typewritten copy	4.75
Fee No. 40—Fee for translation	18.00
Fee No. 41—Fee for carbon	4.75
	$44.00

[fol. 373] Jose Montiel.

Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness, this eighteenth day of November, 1921, before Robert Harnden, Consul of the United States of America. Fernando Juan, Interpreter.

Fee No. 42—Fee for taking deposition, 1,874 words.....	$17.00
Fee No. 43—Fee for typewritten copy.....	5.00
Fee No. 44—Fee for translation.....	19.00
Fee No. 45—Fee for carbon copy.....	5.00
Fee No. 46—12 hours out of office.....	12.00
	$58.00

$58.00 equal to pesetas 400.20.
Consular stamps.

[fol. 374] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

INTERROGATORIES TO MANUEL SAMANO AND MARIANO SANTACANA

First Interrogatory. State your full name, age and place of residence.

Answer of Samano. Manuel Samano, 60 years of age, residing at 18 Dos de Mayo Street, Seville, Spain.

Answer of Santacana. Mariano Santacana, 44 years of age, residing at 12 Rodrigo de Trianna Street, Seville, Spain.

[fol. 375] Second Interrogatory. State whether you were employed in the months of October and November, 1917, and if so, by whom. If you state that you were employed during the months of October and November, 1917, by the claimant, Compania Trasatlantica, state in what capacity you were employed, and what your duties were in that capacity.

Answer of Samano. I was working as stevedore on the wharf during the months of October and November, 1917, under the labor contractor and foreman, Diego Garcia of the Agency of the Compania Trasatlantica in Seville.

Answer of Santacana. I remember to have been working as stevedore during the months of October and November, 1917, for the labor contractor and foreman, Diego Garcia who was employed by the Compania Trasatlantica.

Third Interrogatory. If in answer to the Second Interrogatory you state that you were employed by Compania Trasatlantica, the claimant herein, during October and November, 1917, as a stevedore, please state what experience you have had as a stevedore, especially

in connection with the stowage of barrel cargo for ocean shipment. Did you, during the period in question, assist as stevedore or longshoreman in loading the cargo on the steamship "Mogador" at Seville for transportation to Cadiz on or about October 25th—27th in- [fol. 376] clusive, 1917? If yea, do you recall certain casks of olives consigned by Joseph Y. de Terry to E. Sanchez & Company of New York marked E. S. C., and by Rowlett and Pyman to Austin Nichols & Co. of New York, marked C. A. C., and if so, did you assist in the loading of these casks on the steamship "Mogador" on or about the dates stated.

Answer of Samano. The experience usual to the long handling of casks of olives and I helped in the loading of the shipment of olives referred to in this question.

Answer of Santacana. The continual handling of casks of olives, the principal article of export from Seville. I have helped with the stowing of the shipment of casks of olives mentioned.

Fourth Interrogatory. If in answer to the Third interrogatory you state that you recall said casks of olives, please state when and where you first saw them and describe fully the condition and appearance of said casks at the time that you first saw them, mentioning especially (a) the condition and appearance of the staves of the casks; (b) the condition and appearance of the hoops of the casks; (c) the condition and appearance of the heads of the casks; (d) whether the brine was leaking from any of said casks; (e) whether the casks appeared to be old or new; (f) whether the casks were re-coopered [fol. 377] or repaired before being stowed on the steamship "Mogador"; (g) whether in your opinion these casks were sufficiently strong for transportation of olives to New York City.

Answer of Samano. These casks which were made of chestnut wood, were seen by me on the wharf and I handled them in their removal from the place where they were deposited on the dock to the edge of the wharf and place the slings under them for slinging aboard. In general their appearance was old and defective and many of them were leaking but they were re-coopered by the shippers' coopers before shipment.

Answer of Santacana. These shipments of casks were seen by me first on the wharf and afterwards when handling them during their stowing on the "Mogador." I remember that their staves were very much worn by use; and that their hoops were thin and rusty. Also that some of their ends were warped and that many of the casks were leaking. This leakage was repaired on the wharf by the shippers' coopers. The casks were made of chestnut wood and had the appearance of being old and weak.

Fifth. Interrogatory. If in answer to the Third Interrogatory you state that you loaded said casks on the "Mogador," please describe fully how these casks were stowed in the "Mogador," especially cov- [fol. 378] ering the following points: (a) In what holds and parts of the ship were the casks stowed: (b) whether or not the holds were cleaned before the casks were loaded therein: (c) were the casks stowed with the bungs up or down: (d) did the bilges of the casks

touch the floor or were there quoins under the casks, and if so how many quoins were under each cask; (e) how many tiers high were the casks stowed, and if more than one tier high, what was the method of stowage of the second and later tiers, one on four, or otherwise; (f) was any other cargo stowed on top of said casks, and if so what was its character, and if contained in barrels or casks, what was the size and weight of said barrels and casks compared with the size and weight of the casks of olives; (g) was any dunnage or lumber used in stowing said casks, and if so what, and how was it used; (h) did any of the hoops come off these casks while you were stowing them?

Answer of Samana. I did not see the stowing of the casks but only the loading which was done with slings guided from the wharf one by one and on their bilges.

Answer of Santacano. It is impossible for me to remember the details regarding the stowing of these casks which were loaded in the vessel's two holds and on deck. They were loaded with slings and guided from ashore on their bilges, one by one, and were stowed with chocks and quoins to prevent their bilges from touching the floor.

[fol. 379] Sixth Interrogatory. Did you remain on board the steamship "Mogador" on the trip with said casks to Cadiz and assist in the discharge of said cargo? If yea, was the condition of said casks upon being discharged the same as when loaded upon the "Mogador" and if not, in what particulars did it differ? Were the casks damaged in any way while being loaded in the "Mogador," transported from Seville to Cadiz, or while being unloaded from the "Mogador" to your knowledge?

Answer of Samano. I did not go to Cadiz on the "Mogador."

Answer of Santacano. I was not on the "Mogador" on her trip to Cadiz.

Seventh Interrogatory. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Answer of Samano. I have an idea that owing to the bad condition of these casks the agency demanded guarantees from the shippers to free itself from responsibility which was commented on by the workmen on the wharf.

Answer of Santacana. I only remember that owing to the bad condition of the casks, there was some conversation on board regarding guarantees from the shippers relieving the agency from responsibility.

[fol. 380] CROSS-INTERROGATORIES TO MANUEL SAMANO AND MARIANO SANTACANA

First Cross-interrogatory. State,

(a) How long prior to October, 1917, you had been engaged in the occupation in which you were then engaged.

(b) In detail, what experience you have had in the preparation and stowage of barrel cargoes,

(c) In particular what experience you have had in the preparation and stowage of casks of olives for shipment from Spain to foreign ports,

(d) Have you ever assisted in putting up olives in casks or seen them so put up?

(e) About how many cargoes of olives in casks have you handled?

(f) On how many steamships have you loaded olives in casks for shipment to the United States?

Answer of Samano. I have been working for many years on the wharf loading vessels but I cannot remember exactly how many. (b-c) Experience gained through my years of such work. (d) No. (e-f) I cannot remember.

Answer of Santacana. (a) I have worked as a stevedore since I was very young, but I cannot remember the date when I began. (b) The experience from constant practice. (c) None in [fol. 381] the preparation of casks, but in the stowage, the experience mentioned above. (d) No. (e) Many of them, but it is impossible to remember their number. (f) In many, without being able to state the exact number.

Second Cross-interrogatory. State the name and address of the person, firm or corporation in whose employ you were during October or November, 1917, and in the work you did in or about the steamship "Mogador" in the loading, stowage or discharge of the shipments of olives mentioned in the Fourth Direct Interrogatory addressed to you; and whether you were in the employ of the owners or agents of the said steamship or of anyone employed by them.

Answer of Samano. I was employed by Diego Garcia labor contractor and foreman of the agency of the Compania Trasatlantica for loading and unloading.

Answer of Santacano. I was employed by the labor contractor and foreman, Diego Garcia.

Third Cross-interrogatory. Please state:

(a) How large the casks containing olives were which were loaded on the "Mogador" at Seville in September or October, 1917, consigned to Austin Nichols & Co. or E. Sanchez & Co.

(b) Were they the usual and ordinary casks for containing olives?

[fol. 382] (c) Were they of the usual size for olive casks?

(d) Had you ever before seen olives packed in casks as large as these sacks?

(e) How often had you seen casks of that size used to ship olives?

Answer of Samano. (a) The usual size, that is about ten fanegas of olives. (b) Yes. (c) Yes. (d) Yes. (e) Very frequently.

Answer of Santacana. (a) They were of the usual size. (b) Yes. (c) Yes. (d) Yes. (e) Many times.

Fourth Cross-interrogatory. Please state, in your experience:

(a) How olives are usually packed?

(b) If you say in casks, what is the usual size of the casks?

(c) Of what wood are they usually made?

(d) What is the best size for an olive cask and why?

(e) What size casks are usually used for transatlantic service.

(f) Of what kind of wood were the casks in which these olives were shipped made?

Answer of Samano. (a) In casks for New York. (b) Of about ten fanegas capacity. (c) Of oak and chestnut wood. (d) The [fol. 383] smaller they are the easier they are handled. (e) The usual size of casks of about ten fanegas of olives. (f) Of chestnut wood.

Answer of Santacana. (a) For New York, generally in casks. (b) Of a capacity of about ten fanegas. (c) Of oak and chestnut wood. (d) The smaller the better because it is easier to handle them. (e) I have already stated it, that is, for New York, in casks. (f) Chestnut.

Fifth Cross-interrogatory. If you state that you had anything to do with the loading, stowage, or discharging of said shipment of olives at Seville in October, 1917, state in detail:

(a) Just what you had to do with it;

(b) On what part of the vessel, lighter, wharf or dock you were working;

(c) How long you were on each during the loading or discharging of said vessel.

(d) During what hours of the day was the loading done.

(e) Whether you were in any of the holds of said steamship "Mogador".

(f) Whether you weer in or on any of the lighters from which said olives were loaded on said steamship "Mogador".

(g) What particular holds you were in on the said steamship "Mogador".

[fol. 384] (h) During what part of the time you were in said holds.

(i) What particular parts of the lighters you were in and during what time or times you were in each place.

(j) Just what you were doing in each of said places.

(k) How much of the cargo had been loaded on said steamship "Mogador" when you were first in said holds of said steamship and how much when you were last in them.

(l) How much of the cargo had been unloaded from said lighters when you were first in them and how much when you were last in them.

Answer of Samano. (a) To roll the casks from where they were deposited on the dock to the edge of the wharf, to place beneath them the rope slings and to handle the guide rope from the wharf. (b) I was working on the wharf. (c) During the entire loading of the vessel. (d) From 7 A. M. to 5 P. M., with two hours off for lunch. (e-l) I was on the wharf only. Nothing was loaded on the "Mogador" from lighters but only from the wharf.

Answer of Santacana. (a) To help stowing the casks. (b) In the hold. (c) The time the loading of the "Mogador" lasted. (d) From 7 A. M. to 5 P. M. (e) Yes. (f) They were not [fol. 385] loaded from lighters. (g) In both. h) I cannot remember. (i-j) They were not in lighters. (k) I was on board the "Mogador" from the beginning to the end of the loading. (l) There were no lighters.

Sixth Cross-interrogatory. Did you make personally, an inspection of the casks of the said shipment and ascertain the facts you have mentioned in your answers to the Fifth Interrogatory? If you did, describe exactly what examination you made. Can you say, of your own knowledge, as to these casks before they were loaded on the "Mogador" at Seville.

(a) Whether any of the heads were broken?

(b) Whether any of the hoops were broken?

(c) Whether any of the staves or heads were warped?

(d) Whether the brine was leaking from any of them, and if so, from how many and to what extent?

(e) Whether the brine leaked from any of the casks while they were standing still, or only while they were bing moved?

Answer of Samano. (a-e) It was not my duty to inspect casks to see whether or not they were in good condition but although I am unable after so long a time to remember details, I remember their general condition was bad.

[fol. 386] Answer of Santacana. It was not my duty to make any inspection. I can only remember that these operations were made in the usual manner and I saw that—(a) The heads were not broken but they were warped and leaking. (b) Some of them were broken *but were replaced by new ones.* (c) Yes. (d) Yes, in some of the casks. (e) The leakage was greater when they were moved.

Seventh Cross-interrogatory. If you say that you examined the said casks, state particularly:

(a) Whether you were ordered to do so, and if so, by whom.

(b) How long, to your knowledge, had the casks been in the place where you examined them before you did so.

(c) How many men assisted you in the making of such examination.

(d) What examination did you personally make of these casks.

(e) Exactly how many casks you personally examined.

(f) The manner of your examination:

1. Did you test the casks in any way?
2. Exactly what tests did you make to test their soundness.

3. Did you test the heads and hoops?

[fol. 387] 4. Were the hoops rusty?

5. If so, were they very rusty, and did you scrape any of the rust off?

6. Did any of the hoops break when you examined them, and if so, which hoops, and on how many of the casks?

(g) Did you move any of the casks in making your examination? If so, in what way and for what purpose?

(h) If you say, in answer to the Fifth Interrogatory, that the casks were not sufficiently strong for shipping olives to New York, state exactly in what respect they were inadequate and on what you base your opinion. What tests did you apply to ascertain this? Or do you base your opinion merely on observation?

(i) What examination did you make of the barrels?

(j) In detail, what casks do you claim that you saw.

(k) If you know, were the casks which you saw being used for the first time on this trip.

(l) If not, how long had they been in use?

(m) How do you know they had been so long in use?

(n) Did you examine each barrel and cask to see about its condition?

[fol. 388] (o) Where were the casks when you examined them?

Answer of Samano. (a-e) I was not ordered to make any examination of the casks nor was it my duty to do so, I had only to follow the instructions regarding the cargo given me by the foreman, Diego Garcia, whom I heard, at different times, asking the shippers' coopers to repair casks which were leaking and otherwise defective.

Answer of Santacana. (a-o) I did not examine them because I was not asked to but I could see their bad condition when handling them for stowing.

Eighth Cross-interrogatory. Did you see the said casks hoisted from the said lighters and lowered into the hold of the said Steamship "Mogador" at Seville? If yes, please state:

(a) How the tackle slings were attached to said casks.

(b) How said casks rested in said slings.

(c) Whether any of the said casks broke or were strained to your knowledge while being so hoisted or lowered and if so in what manner they were broken or strained and how many were broken or strained.

(d) Whether any of the casks came in contact with anything after they left the lighter's hold and before they reached the bottom [fol. 389] of the hold of the "Mogador" and if so, with what they came in contact and how many so came in contact with anything.

(e) How the slings were worked; if by a steam winch, describe exactly how it was done.

(f) Exactly how the casks were lifted from the lighters, guided into place and lowered.

(g) How many men handled each cask in removing them from the slings.

(h) If any of the casks were broken, whether they were recoopered or repaired and if so how many casks were so repaired, and exactly what work was done on them; when the work was done; how it was done and by whom it was done.

Answer of Samano. (a-h) The casks were not taken from nor given to lighters but to the "Mogador" only and direct from the wharf, one by one with slings guided from the shore and on their bilges.

Answer of Santacana. (a-h) They were not taken from lighters.

Ninth Cross-interrogatory. (a) Is it part of your duty to examine cargoes presented for shipment?

(b) Is it part of your duty to make reports thereon?

[fol. 390] (c) If you make such reports, to whom do you usually make them?

(d) Is such report usually in writing or oral?

(e) Did you call the attention of the shippers at Seville to the condition of those casks?

(f) Did you call the Captain's attention to it?

(g) Did you have any conversation with anyone else on the subject?

(h) If so, report it as well as you can remember it.

Answer of Samano. (a-h) It is not a part of my duty which was only to follow the instruction received from the foreman, Diego Garcia, regarding the loading.

Answer of Santacana. (a-h) No.

Tenth Cross-interrogatory. Were the casks loaded in the holds or on the decks of the lighters in Seville and in how many tiers were they loaded in the lighters?

Answer of Samano. There were not lighters used in Seville.

Answer of Santacana. They were not taken from lighters.

Eleventh Cross-interrogatory. What was the freeboard of the [fol. 391] lighters at Seville from which the olives were loaded on the "Mogador" before any olives were unloaded from them?

Answer of Samano. There were no lighters used in Seville.

Answer of Santacana. They were not taken from lighters.

Twelfth Cross-interrogatory: (a) To whom did the lighters from which the olives were loaded upon the "Mogador" at Seville belong?

(b) By whom were they operated?

(c) Under whose control were they?

Answer of Samano. There were no lighters used in Seville.

Answer of Santacana. They were not taken from lighters.

Thirteenth Cross-interrogatory. If you stated that any of the casks broke at Seville, please answer the following:

(a) Did the casks which broke, break as they were being raised from the lighter to be loaded on the "Mogador"? If so, how many casks then broke?

(b) Did they break while they were being loaded into the "Mogador"? If so, how many casks then broke.

[fol. 392] (c) Did they break when they reached the hold of the "Mogador" and came to rest there as they were lowered into the "Mogador"? If so, how many casks then broke?

(d) Did they break after they reached the hold of the "Mogador"? If so, how many casks then broke?

Answer of Samano. (a-d) I did not see any casks break nor was I aboard the "Mogador."

Answer of Santacana. (a-d) I do not remember that any casks broke.

Fourteenth Cross-interrogatory. If any of the casks leaked at Seville:

(a) 1. Did any of the casks leak as they were raised from the lighter to be lowered into the hold of the "Mogador" at Seville?

—. How much did they leak?

3. How many casks leaked?

(b) Did any of the casks leak while being lowered into the "Mogador"—how many so leaked?

(c) Did any of the casks leak while being lowered upon the lighters? How many so leaked?

(d) Did you actually see any liquid running from any of these [fol. 393] casks at Seville while being raised from the lighters or lowered into the "Mogador"?

(e) Did any of the casks leak while they were standing still, or did they leak only when they were being moved? To exactly what extent did they leak when standing still or when being moved?

(f) State exactly to what the leaking was due in each case.

(g) Is it not a fact that there is always more or less leakage from olive casks?

Answer of Samano. (a-g) Many of them were leaking on the wharf but they were repaired before being loaded on the "Mogador." I cannot remember any further details.

Answer of Santacano. (a-g) I saw them leaking only on the wharf without knowing what caused the leaking and I saw them being recoopered by the shippers' coopers.

Fifteenth Cross-interrogatory. State, if you know, from whom the casks in which said olives were shipped at Seville were obtained by the person who packed and shipped said olives.

Answer of Samano. I do not know.

Answer of Santacana. I do not know.

Sixteenth Cross-interrogatory. If you saw the loading of the casks of olives in this action into the "Mogador" at Seville, please answer the following:

[fol. 394] (a) Did you go aboard either of said ship or said lighters?

(b) How many times did you go aboard said "Mogador" or said lighters?

(c) Did you stay on the deck of said "Mogador" or of said lighters or either of them?

(d) Did you go into the lower hold of said "Mogador" or into the hold of said lighters or either of them?

(e) Did you stay on the deck and look into the hatchway of said "Mogador" or of said lighters or either of them?

(f) If you did not go into the hold, how much of said hold could you see from the hatchway?

(g) Did you go into the hold of said "Mogador" or of said lighters after they were partly loaded?

(h) Did you make a special trip into the hold of the "Mogador" to look at the dunnage?

(i) Why did you take so much interest in the dunnage?

(j) How is it that you can remember this particular dunnage, planks, wedges, chocks or quoins, after more than two years?

[fol. 395] (k) Did you examine the dunnage, chocks or quoins in every ship on which you worked since October, 1917?

(l) On how many ships have you stowed olives since 1916?

(m) On how many steamers have you examined the dunnage, chocks, quoins and stowage of olives since October, 1917?

(n) Did you see each cask in this case, stowed on said "Mogador" or said lighter?s

(o) How can you now recollect the stowage on said "Mogador" or said lighters?

Answer of Samano. (a) No. I was on the wharf only. (b-c) I did not go aboard the "Mogador" nor into her holds, as that was not my duty.

Answer of Santacana. (a) On board the "Mogador." (b-o) I was in the hold of the "Mogador" attending to my work in the stowing of the casks which operation was directed by our foreman, Diego Garcia. I cannot remember any further details requested in this question.

Seventeenth Cross-interrogatory, State:

(a) Whether you actually saw the bottom tier of casks put in place in any of the holds of the "Mogador" or on said lighters.

(b) In which of the holds you actually saw with the bottom tier only in place.

[fol. 396] (c) Whether you saw the completed load in place in any of the holds or in any of the lighters, and if so, in which holds or which parts of said lighters.

(d) In how many tiers were the casks loaded:

1. In the "Mogador."

2. On the lighters.

Answer of Samano. (a-d) I did not work in the stowing of the "Mogador."

Answer of Santacana. (a-d) I helped stow the bottom tier, the second tier and the few casks that were placed in the third tier.

Eighteenth Cross-interrogatory. If there were blocks, chocks or quoins beneath the casks in any of the holds of the Steamship "Mogador" or of said lighters, state:

(a) How far from the ends of the casks such blocks or chocks were placed.

(b) Whether blocks or chocks were placed under the ends of every cask in the bottom tier.

(c) If your answer to the last question is in the affirmative, state how you could see all of the said chocks or blocks.

(d) Whether any other cargo was stowed on top of the said casks, and if so, what cargo.

[fol. 397] (e) What was placed between the upper and lower tier of casks, and between the casks and any cargo that was placed on top of them. Describe how this was done.

(f) Whether there were any blocks or chocks on or under any part of the casks, other than the ends of those in the lower tier, and if so, in which holds they were and where they were placed as respects the casks and on which tier they were placed.

Answer of Samano. (a-f) I was not aboard the "Mogador."

Answer of Santacana. (a-f) All the casks were quoined in such a way as to leave their bilges free. I cannot remember any further details in this respect.

Nineteenth Cross-interrogatory: (a) When the lighters were unloaded at Seville, were all the casks and the cargo above them in place?

(b) Was any of the other cargo loose or moved from its place? If yes, describe exactly what had happened.

(c) Had any of the hoops come off any of the casks when they were unloaded at Seville? If so, how many?

[fol. 398] (d) Were these casks recoopered? If so, in what way?

(e) Had any of the olives in any of the casks come out of the casks to your knowledge, by the time the casks were loaded on the "Mogador" at Seville?

(f) From how many casks had olives so come out?

(g) How much of the olives had so come out of the casks?

Answer of Samano. (a-g) There were no lighters used in Seville.

Answer of Santacana. (a-g) The casks were not taken from lighters but from the wharf.

Twentieth Cross-interrogatory. Please state whether there were any fore and aft or athwartships boards or planks used as dunnage on the "Mogador" for these casks of olives, and if you know, state:

(a) Upon what the ends of these planks rested in each hold.

(b) Upon what the parts of said planks between them were rested in each hold.

(c) Whether any of the said planks rested on the bilges of the said casks and, if so, just where they were located.

(d) Whether the casks on which the said planks rested were [fol. 399] standing on end or lying on their bilges in each of the holds.

(e) Whether there were any casks on top of said planks and, if so, whether they were standing on end, or lying on their bilges.

(f) Just how the casks that were standing on end were dunnaged in each of the holds.

(g) Whether the boards or planks were fastened in any way, and if so, describe in detail how and to what they were fastened in each hold.

(h) Whether there were two or more tiers of casks, whether there were boards or planks between them, and if so, whether said planks

rested on the ends or on the bilges of the casks, and whether the ends or bilges of the casks rested on the planks beneath them.

Answer of Samano. I was not aboard the "Mogador."

Answer of Santacana. (a-h) Quoins and chocks were used in all places leaving the casks firmly secured as is usual and also planks to facilitate the rolling of the casks in stowing.

Twenty-first Cross-interrogatory: With reference to the planks, if any, as dunnage, on the Steamship "Mogador", please state:

[fol. 400] (a) Whether the planks cleared the bilges of the casks below them.

(b) What distance there was between the planks and the bilges of the casks.

(c) Did you make any actual examination to see if these planks cleared the bilges of the casks?

(d) How did you make such examination?

(e) Was there any cargo stowed between the top tier of barrels and the deck of the steamer or above the top tier of barrels on the lighter?

(f) If so, how much space was left in the steamer between the top tier of casks and the deck above in each hold.

Answer of Samano. It was not aboard the "Mogador."

Answer of Santacana. (a-f) I do not remember any further details, only those mentioned in the above answer.

Twenty-second Cross-interrogatory: Were any of the casks of olives stowed on their ends on the lighters or on the Steamship "Mogador" at Seville, and if so:

(a) Where were they so stowed?

(b) In which holds and which parts of the holds were they so stowed?

[fol. 401] (c) How many were so stowed?

(d) In how many tiers were they stowed in each place in which they were stowed?

(e) What was stowed under said casks in each place?

(f) What was stowed above said casks in each place?

Answer of Samano. I was not aboard the "Mogador".

Answer of Santacana. (a-f) All the casks were on their bilges in the "Mogador".

Twenty-third Cross-interrogatory. If in stowing said olives in the said Steamship "Mogador" at Seville or on said lighters at Seville, there were no boards or planks used in any place, state in which holds or places there were no such boards or planks used.

Answer of Samano. I was not aboard the "Mogador".

Answer of Santacana. All the casks stowed on the "Mogador" had quoins and chocks as usual.

Twenty-fourth Cross-interrogatory. Annex to these interrogatories diagram showing just how the tiers of casks were stowed on top of one another in each of the holds of the Steamship "Mogador" and also on the lighters at Seville, giving a side view, top view and [fol. 402] end view, and indicating on the said diagram where the dunnage was placed and what it consisted of, and just how it

was placed and indicate if any blocks or quoins were placed elsewhere than beneath the casks.

Answer of Samano. I do not know how to draw.

Answer of Santacana. I do not know how to draw.

Twenty-fifth Cross-interrogatory. State, if you know, who owned or controlled the quay at Seville on which these olives were stowed before they were placed on board the Steamship "Mogador"?

Answer of Samano. The "Junta de Obras del Puerto de Sevilla".

Answer of Santacana. The "Junta de Obras del Puerto de Sevilla".

Twenty-sixth Cross-interrogatory. State, if you know whether any objections were made to the casks in which said olives were shipped or whether any objections were made to receiving them aboard said lighters or said "Mogador" and if so, please state:

(a) Whether you personally heard any of the alleged objections made.

(b) If so, to whom the alleged objections were made.

[fol. 403] (c) Who made the alleged objections.

(d) Did you personally make any of the alleged objections? If so, state exactly what you said and to whom you made said objections and what was said to you in reply.

(e) What did the alleged objections consist of, that is, exactly what did you hear said?

(f) Do you know by whom the man to whom said objections were made was employed? If yes, state by whom he was employed, and how you know this.

(g) In what capacity was the man to whom the said objections were made employed? How do you know this?

(h) To how many men were the said objections made?

(i) Give the names of all persons to whom said objections were made, and state, if you know exactly what was said to each one and exactly what he said in reply.

(j) If any of said alleged objections were made in writing please attach copies thereof hereto, or state why you cannot do so.

Answer of Samano. (a-j) I remember that the foreman was talking with the foremen who brought in the cargo and with the captain [fol. 404] of the "Mogador" regarding the bad condition of these casks. I heard a few of my companions on the wharf say that the agency demanded certain guarantees from the shippers of these casks.

Answer of Santacana. (a-j) I remember that the foreman reported to the Captain of the ship the bad condition of these casks and I heard that the agency demanded guarantee from the shippers. I know no further details in this respect.

Twenty-seventh Cross-interrogatory. Please state:

(a) How many shipments of olives have you seen shipped from Seville in bad order and condition?

(b) Did you see any of the bills of lading and receipts given for each one of such consignments, and see what notations were made on them?

(c) If so, what notations were made on said bills of lading, or receipts?

(d) Upon what and how many bills of lading or receipts were such notations made?

(e) By whom and by what steamship line were such shipments made?

Answer of Samano. (a) I cannot remember. (b-d) That was not my duty. (e) I cannot remember.

[fol. 405] Answer of Santacana. (a) It is impossible to say the exact number.

Twenty-eighth Cross-interrogatory. If you gave any receipts or other papers or documents for any of said olives in this case, please annex copies thereof hereto.

Answer of Samano. That was not my duty.

Answer of Santacana. It was not my duty.

Twenty-ninth Cross-interrogatory. If you signed any papers or documents for or in connection with said shipment of olives:

(a) Did you ask for or receive any letters of guarantee or other similar agreement before so signing such papers for said shipments?

(b) Were any demands made by you, or by any one else, to your knowledge, for letters of guarantee before signing any receipts or bills of lading for said olives. If so what such demands were made, by whom, and to whom were they made. Were they made to you or by you or in your hearing?

(c) State exactly what was said to you or in your hearing concerning such guarantees.

(d) Did you see any such guarantees?

[fol. 406] (e) Did you see them given. If so to whom and by whom were they given?

(f) In whose possession did you see them?

(g) Did you see them written?

(h) Do you know the handwriting or signatures on them? If so, who wrote or signed them?

(i) What was done with such guarantees?

(j) What, if you know, was the purpose of giving or obtaining such letters or guarantees?

Answer of Samano. That was not my duty.

Answer of Santacana. (a-j) No, as it was not my duty to do so.

Thirtieth Cross-interrogatory: (a) How have you been able to keep clear in your mind all the facts concerning which you have testified in answer to the Direct Interrogatories and these Cross Interrogatories?

(b) Have you made a written statement in this case?

(c) If so, to whom did you give such statement and where is it now, if you know?

(d) Annex such statement or a copy thereof to your answers to these Interrogatories.

[fol. 407] Answer of Samano. (a) The few things I remember about this shipment are based in the fact that it consisted, with the

exception of a few bundles of garlic, entirely of olive casks. (b-d) No, nor was it my duty to do so.

Answer of Santacana. (a-d) As can be seen by these answers, my recollections are far from being complete in the matter especially so considering the time that has elapsed.

Thirty-first Cross-interrogatory. (a) Have these Cross Interrogatories been communicated to you either in form or substance prior to the time of your giving your testimony in this action?

(b) If so, state by whom they have been communicated to you and how.

(c) Have you had any communication with anyone concerning the testimony you should give on this occasion, and if so, with whom?

(d) If so, what was then said to you in that connection?

(e) Have you refreshed your recollection as to anything you have testified to in answer to these Interrogatories, if so, how have you done so?

Answer of Samano. (a-d) No. (e) I have forced my memory but am unable to remember any thing more.

[fol. 408] Answer of Santacana. (a-e) Up to the present I have had no news regarding this matter, nor can I remember any further details.

Thirty-second Cross-interrogatory. If any of your answers to any of these Direct or Cross Interrogatories are based on information given to you by others or statements made to you, state which of your said answers are so based.

Answer of Samano. My answers are based on my recollection only.

Answer of Santacana. All my answers are based in the truth of what I saw in my secondary position aboard.

[fol. 409] Manuel de Samano.

Examination taken, reduced to writing, subscribed to by the witness and by the sworn interpreter, and sworn to by the witness, this thirtieth day of January, 1922, before: Robert Harnden, Consul of the United States of America. Fernando Juan, Interpreter. Clifford W. McGlasson, Witness.

Fee No. 51—Fee for taking deposition 722 words.....	$11.50
Fee No. 52—Fee for typewritten copy	2.25
Fee No. 53—Fee for translation	8.00
Fee No. 54—Fee for carbon copy	2.25
	$24.00

$24.00 equal to pesetas 165.60.
Consular Stamps.

[fol. 410] Mariano Santacana.

Examination taken, reduced to writing and by the witness subscribed and sworn to this thirtieth day of January, 1922. Robert Harnden, Consul of the United States of America. Clifford W. McGlasson, Witness. Fernando Juan, Interpreter.

Fee No. 47—Fee for taking deposition 797 words	$11.50
Fee No. 49—Fee for twpewritten copy	2.25
Fee No. 49—Fee for translation	8.00
Fee No. 50—Fee for carbon copy	2.25
	$24.00

$24.00 equal to pesetas 165.60.
Consular Stamps.

[fol. 411] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

INTERROGATORIES TO EDUARDO BENJUMEA

JOSE BENJUMEA, of 11 Pedro del Toro Street, Seville, Spain, whose occupation is that of Steamship Agent, age 52 years being duly and publicly sworn, pursuant to the directions hereto annexed and examined on the part of the claimant, answering the interrogatories and cross-interrogatories addressed to Eduardo Benjumea, the brother of the deponent, and whose power of attorney the deponent holds, a [fol. 412] duly certified copy of which is hereto annexed, deponent being in charge of the agency of the Compania Trasatlantica at Seville, Spain, and in particular of the matters inquired into by said interrogatories and cross-interrogatories, doth depose and say as follows:

First Interrogatory. State your full name age and place of residence.

Answer. Jose Benjumea, 52 years, residing at 11 Pedro del Toro Street, Seville, Spain.

Second Interrogatory. State whether you were employed in the months of October and November, 1917, and if so, by whom. If you state that you were employed during the months of October and November, 1917, by the claimant, Compania Trasatlantica, state in what capacity you were employed, and what your duties were in that capacity.

Answer. I was acting in the capacity of agent of the Compania Trasatlantica through the power of attorney, copy of which is annexed hereto and marked exhibit No. 1, granted me by my brother Eduardo Benjumea who was appointed by the head office. The

agency at Seville communicates with the head office through the delegation at Cadiz.

Third Interrogatory. If in answer to the Second Interrogatory you state that you were employed by the Compania Trasatlantica dur-[fol. 413] ing October and November, 1917, as agent at Seville, please state whether you recall certain shipments of olives consigned by Joseph Y de Terry to E. Sanchez & Company of New York and by Rowlett & Pyman consigned to Austin Nichols & Company of New York, which were presented on or about October 25th-27th inclusive, 1917, at Seville, for shipment on the S. S. "Mogador" to Cadiz where they were to be trans-hipped to the "Isla de Panay."

Answer. I do remember but with some inconsistency some of the facts referred to in this question.

Fourth Interrogatory. If in answer to the Third Interrogatory, you state that you recall said shipment of olives, please state whether you received any report from Antonio Pastrana, Captain, Jose Montiel, boatswain and Diego Garcia, in charge of the stowage of the "Mogador" as to the condition of the casks in which said olives were contained. If yea, and said reports were in writing, produce and attach the originals to your answer. If you cannot attach the originals, say why and attach copies, certified by the Commissioner to be true copies upon comparison, together with a translation thereof into English; if said reports were oral, state the substance thereof, the person by whom made and the time when and place where made.

Answer. I did receive from the captain of the "Mogador," Antonio [fol. 414] Pastrana and also by word of mouth from the foreman Diego Garcia, complaints regarding the old and weak condition of the olive casks that were being shipped on said vessel. The complaint consisted in the fact that the casks were old and weak although they were not broken. Had they been broken they would have been replaced by others. Also they did not seem to be strong enough to guarantee their arrival in New York in the same condition in which they were presented for shipment.

Fifth Interrogatory. If in answer to the Fourth Interrogatory you state that you received such reports from the above officers or employees, please state what you did as a result thereof. If you say that you demanded letters of guarantee from the consignors, please state whether claimant's Exhibits 13, 14 and 15 for identification which are shown to you by the Commissioner, are the letters of guarantee which you received from said consignors, and if so, have them marked as exhibits by the Commissioner and attached to your answer. Please state what the custom is in Spain, according to your own experience, with regard to omitting to note the condition of defective containers upon bills of lading when letters such as claimants Exhibits 13, 14 and 15 for identification are given by the consignors. In connection with the above question, please state how long you have been engaged in the Steamship business and what experience you have had in said business.

[fol. 415] Answer. In view of the above and as was usually done in such cases, according to custom and at the request of the shippers

in order that their goods might not be prejudiced more than was necessary, and at the same time to relieve the company which I represent from responsibility, I ordered the acceptance of the letters of guarantee mentioned in this question and numbered 13—14—15 in claimant's exhibit submitted for identification which were shown to me by the Commissioner and identified by me in accordance with my answers and marked exhibits numbers 2—3—4. The custom of demanding letters of guarantee by steamship companies from shippers to protect themselves from possible claims for the arrival in bad condition of the shippers' goods at the port of destination, is old and well established and based on the following: (1) The decided opposition on the part of the shippers to notations being placed on the bills of lading which unnecessarily prejudices their goods and leaves everything to the good faith of the receivers. (2) Due to the general character that would necessarily have had to be given to the notations on the bills of lading and it being practically impossible to examine carefully all the casks one by one both on account of economy and fixed dates on which the mail boats of the Compania Trasatlantica had to depart from Cadiz for the States; we could make, with such notations, greater damage than would be [fol. 416] justifiable, which considering the honorable practices of the Compania Trasatlantica, we naturally tried to avoid; (3) Although letters of guarantee were always requested for the above stated reasons, an exceptional use of these letters was made during the European war, as a consequence of the general bad quality of the packing which, during that time, was presented for shipment. This bad quality of the packing was due to the lack of containers in good condition and an enormous demand for containers of this class which it was impossible to meet. What took place was the use of all available containers notwithstanding their sometimes inferior quality, that is, chestnut wood was accepted in place of oak in spite of the fact that old oak containers are stronger than new ones of chestnut. I have been sixteen years in the shipping business as shipping agent, and have had a great experience in matters thereto pertaining, derived from the years so spent.

Sixth Interrogatory. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Answer. When the shipping notes for New York were sent to [fol. 417] this agency for the SS. "Isla de Panay" it was at first thought that the cargo covered by said notes could all be stowed on the "Mogador". Later, and after a consultation with the captain of the "Mogador" it was found that all the casks intended for this vessel could not be stowed due to the lack of space. It was then decided to suggest that the 69 casks covered by bill of lading No. 4 should be sent at the exclusive risk of the shipper by rail to the Trocadero which suggestion was accepted by the shippers who sent them to the railway station at Seville in the presence of the foreman,

Diego Garcia. The reason why the copies of the bill of lading No. 4 for New York covering the 69 casks referred to above which were signed with a rubber stamp bearing the name of the captain of the "Mogador" as though these casks had been transported to Cadiz by the "Mogador" instead of by rail as they finally were shipped, was due to their having been admitted in the belief that they could be transported in the "Mogador". All the documentation of the "Mogador's" cargo was made in this belief based on the assumption that they would be able to take the 69 casks as well, a mistake which I noted only after the "Isla de Panay" had left Cadiz. The justification for this mistake consists in the fact that never before had the "Mogador" been unable to take the entire cargo and therefore, never before had it been necessary to send cargo by rail. The only importance attached to this procedure is the bills of lading [fol. 418] having been signed by the Captain of the "Mogador" instead of by the Captain of the "Isla de Panay" or myself as agent due to the latter's absence. The company had absolute confidence in both these captains. The railway receipts covering this cargo were seven in number, namely: 80957 to 80963 inclusive, dated at the end of October, 1917.

CROSS-INTERROGATORIES TO EDUARDO BENJUMEA

First Cross-interrogatory. How long prior to October, 1917, were you engaged by the Compania Trasatlantica as agent at Seville?

Answer. Sixteen years.

Second Cross-interrogatory. If you say, in answer to the Fourth Interrogatory that you received the report therein referred to, did you verify it in any way? Did you personally examine or inspect the casks in the shipment referred to?

Answer. Receiving as I did, the report of the bad condition of these barrels from such reliable and expert sources as the foreman Diego Garcia, the boatswain, and Captain of the "Mogador"; I did not think it necessary to make a personal inspection, especially as [fol. 419] the shippers were willing and offered to give me letters of guarantee absolving the company from responsibility.

Third Cross-interrogatory. If you state, in answer to the Fifth Interrogatory, that you demanded letters of guaranty from the consignors—

(a) State who the consignors were to whom you spoke.

(b) Did they refuse to sign such letters, or make any objection?

(c) If so, what did they say?

(d) Had bills of lading been issued to the shippers before you requested the said letters?

Answer. (a) Joseph y. de Terry, Juan Tolibia, and Rowlett and Pyman to whom the employees at my office spoke in my name. (b) They made no objection. (c) They said that they would give such letters of guarantee with the understanding that no notations would be made on the bills of lading to which they were strongly

opposed as they understood the goods were to be left entirely to the good faith of the receivers. (d) The bills of lading were not delivered to the shippers until the corresponding letters of guarantee had been given to the company's agent.

Fourth Cross-interrogatory: (a) What was your usual practice when defective goods were offered for shipment?

[fol. 420] (b) Did you usually demand letters of guarantee and give clean bills of lading?

(c) Have you yourself done so in other cases?

(d) Why is not a note made in such cases upon the bills of lading?

(e) How many copies of the letters of guarantee were made?

(f) Were any of them attached to the bills of lading?

Answer. (a) To demand letters of guarantee when the containers were seen to be in bad condition when presented for shipment rather than make notations even of a general nature on the bills of lading, which notations would possibly prejudice too greatly the entire shipment. The shippers were also opposed to this latter procedure. (b) No. The shippers generally offered such letters of guarantee on the condition that no notations of any kind should be made on the bills of lading. (c) Yes. In many other cases shippers have asked that no notations be made on the bills of lading covering similar goods and I, myself, have insisted that such notations be made on the bills of lading unless the shipper gave me a letter of guarantee. (d) They are not made because the shippers were opposed to it and they offered to substitute letters of guarantee for notations on the bills of lading basing their opposition on the fact that such notations prejudiced their goods due to the bad [fol. 421] character ensuing therefrom, in general, to the entire cargo and considering the material impossibility of examining the cargo, barrel for barrel. As soon as defects are observed in a few of the barrels, the agent is notified so that notations may be made. (e) A letter of guarantee was given by each of the three above mentioned shippers. (f) I cannot remember this.

Fifth Cross-interrogatory. (a) If you say, in answer to the Fifth Interrogatory, that it is the practice in Spain for the shipper to give letters of guarantee and for the Captain to issue clean bills of lading, state what is done to give the holder or transferee of the bills of lading notice of the condition of the goods.

(b) Is not such a practice apt to work a fraud upon such holder or transferee?

(c) Did the consignors in this case request you to give clean bills of lading?

(d) At whose request were the letters of guarantee given, the consignors' or your company's?

Answer. (a) I do not know. (b) The letters of guarantee were issued at the request of the shipper to take the place of notations on the bills of lading which they wanted to have clean. Due to the interest of the shippers in maintaining their good reputation and retaining their clients and increasing their sales, I do not think [fol. 422] that this practice induces fraud against the holder or

transferee. (c) Yes. (d) The letters of guarantee were offered by the shippers on the condition that no notations should be made on the bills of lading and they were accepted by me.

Sixth Cross-interrogatory. State, if you know, who owned or controlled the quay at Seville on which these olives were stowed before they were placed on board the Steamship "Mogador."

Answer. The "Junta de Obras del Puerto de Sevilla." (Board of Works of the Port of Seville).

Seventh Cross-interrogatory. State, if you know, whether any objections were made to the casks in which said olives were shipped or whether any objections were made to receiving them on board said lighters or said "Mogador" and it so, please state:

(a) Whether you personally heard any of the alleged objections made;

(b) If so, to whom the alleged objections were made;

(c) Who made the alleged objections:

(d) Did you personally make any of the alleged objections? If so, state exactly what you said and to who you made said objections and what was said to you in reply.

(e) What did the alleged objections consist of, that is, exactly what did you hear said?

[fol. 423] (f) Do you know by whom the man to whom said objections were made was employed? If yes, state by whom he was employed, and how you know this.

(g) In what capacity was the man to whom the said objections were made employed? How do you know this?

(h) To how many men were the said objections made?

(i) Give the names of all persons to whom said objections were made, and state, if you know exactly what was said to each one and exactly what he said in reply.

(j) If any of said alleged objections were made in writing please attach copies thereof hereto, or state why you cannot do so.

Answer. (a)-(b)-(c)-(d). Objections were made on the receipt of these containers by the captain and the boatswain of the "Mogador," and the foreman, Diego Garcia, came to the office to personally report this. These objections were cited to the shippers in my office who then offered letters of guarantee to take the place of notations on the bills of lading. (d) That the casks while not being broken, in which case they would have been replaced by others, were old and weak and they did not appear strong enough to entirely guarantee their safe arrival in New York. (f)-(g)-(h)-(i). The first objections were made at the wharf by the captain of the "Mogador" [fol. 424] and the foreman of the company to the foreman of the shippers whose names, after such a lapse of time, I do not remember. Regarding the objections made in my office, they were made to the shippers themselves or to their respective representatives. (j) No, the objections were made by word of mouth only.

Eighth Cross-interrogatory. Please state:

(a) How many shipments of olives have you seen shipped from Seville in bad order and condition?

(b) Did you see any of the bills of lading and receipts given for each one of such consignments, and see what notations were made on them?

(c) If so, what notations were made on said bills of lading, or receipts?

(d) Upon what and how many bills of lading or receipts were such notations made?

(e) By whom and by what steamship line were such shipments made?

Answer. (a) Although during the war I frequently saw defective casks shipped, it is impossible to say how many. (b)-(c)-(d)-(e). I did not see and therefore cannot reply.

Ninth Cross-interrogatory. If you gave any receipts or other papers [fol. 425] or documents for any of said olives in this case, please annex copies thereof hereto.

Answer. I issue the bills of lading only.

Tenth Cross-interrogatory. If you state that you received letters of guarantee from any of the shippers of olives, state:

(a) Did you ask for or receive any letters of guarantee or other similar agreement before so signing such papers for said shipments?

(b) State exactly what was said to you or in your hearing concerning such guarantees.

(c) Did you see any such guarantees?

(d) Did you see them given? If so, to whom and by whom were the given?

(e) In whose possession did you see them?

(f) Did you see the letters signed?

(g) Do you know the handwriting or signatures on them? If so, who wrote or signed them?

(h) What was done with such guarantees?

(i) What, if you know, was the purpose of giving or obtaining such letters of guarantee?

Answer. (a) I received the three letters of guarantee already mentioned, before making delivery of the bills of lading to the shippers. [fol. 426] (b) It is impossible to remember these details. (c) Yes, all of them. (d)-(e)-(f)-(g). I saw them all in my office but I did not see them being written and the signatures appeared to me to be those of the shippers. (h) I think they were sent attached to the cargo manifest of the "Isla de Panay" which document is intended for the agency of the company at the port of destination of the goods. As the letters of guarantee were lost copies of them were obtained and forwarded to our New York agency. (i) This question has already been answered in question 5-(b) of this cross-interrogatory.

Eleventh Cross-interrogatory. If any of your answers to any of these Direct or Cross Interrogatories are based on information given to you by others or statements made to you, state which of your said answers are so based.

LIBELANT'S EXHIBIT NO. 1 COPY

EXAMINED FOR----------Firemens Fund Insurance Company. #29113

CONSIGNED TO----------Messrs Austin, Nicholas & Company,

EX----------S. S."ISLA DE PANAY"

FROM----------Spain, arr'd November 20, 1917.

SHIPMENT

C A T
1/158 - 158 Casks

V K
1/69 - 69 "

227 Casks Green Olives Ptas 67,962.40

On November 23, 1917 and subsequent days having been informed that many casks of the above shipment were being discharged from the above Steamer in severely damaged condition, we proceeded to Pier 8, East River, and examined the casks already discharged, finding many of them to have staves crushed and many to have lost hoops, which were being replaced assured's coopers.

We also proceeded aboard the above Steamer and examined casks which were stowed in the lower holds of the various hatches. The casks were apparently well stowed, being tiered only two high, and the landed condition of the damaged ones, in our opinion, was attributable to rough handling; we noted especially in the #1 hatch that sling loads of other cargoes were being dragged and slid overthe casks which resulted in the loosening of the hoops and also the loss of hoops on the casks, also that staves were broken and depressed where the sling loads had apparently been set down.

All the damaged casks were recoopered and rebrined be assured's coopers and placed on Lighters for transportation to warehouse with the following exceptions:

C A T

#8	- 1 Cask	7 Hoops off,	head replaced
17	- 1 "	5 " "	stave broken at chime
28	- 1 "	3 " "	head out
34	- 1 "	4 " "	4 staves crushed
43	- 1 "	Landed in staves	
53	- 1 "	4 Hoops off,	head out, 1 stave crushed
77	- 1 "	6 " "	head replaced
107	- 1 "	6 " "	head replaced, 4 staves crushed
125	- 1 "	4 " "	head out
132	- 1 "	Landed in staves	
141	- 1 "	4 Hoops off,	2 staves broken at chime
142	- 1 "	5 " "	staves flattened

The above 10 casks we examined at Pier 8 on December 7th finding their contents to be rotted and worthless; the contents of the two casks landed in staves were lost.

Subsequently, on January 18, 1918 we met representative of Messrs. Austin, Nichols & Company at the Waterside Warehouse, Kent Avenue, Brooklyn, where we made detailed examination of the following and agreed to estimates of damage or disposition as noted:

C A T

#1	1	cask	one stave broken, Damaged 50%
#2	1	"	2 hoops off, Damaged 40%
#3	1	"	2 " " Damaged 15% head staves broken
#5	1	"	6 " " head replaced, worthless
#11	1	"	Leakage at chimes To sell
#13	1	"	5 hoops off, head bulged, to sell.
#14	1	"	4 " " To sell
#19	1	"	4 " " Damaged 25%
#20	1	"	2 " " To sell, 1 stave crushed.
#23	1	"	1 " " Head bulged, to sell.
#24	1	"	4 " " One stave cracked. To sell.
#25	1	"	5 " " " "
#31	1	"	4 " " " "
#32	1	"	3 " " " "
#35	1	"	4 " " Head replaced, worthless.
#36	1	"	4 " " To sell
#38	1	"	4 " " " "
#42	1	"	1 " " " "
#44	1	"	6 " " " "
#48	1	"	1 " " " "
#57	1	"	3 " " " "
#59	1	"	2 " " " "
#60	1	"	1 " " Stave broken at chime. To sell.
#62	1	"	Leakage at chimes seams. damage 20%
#63	1	"	3 hoops off. Damage 35%
#64	1	"	1 Stave broken, head replaced. To sell.
#65	1	"	5 hoops off. " "
#67	1	"	3 " " " "
#75	1	"	4 " " 1 stave broken at chime, to sell.
#76	1	"	3 " " Five staves crushed.
#84	1	"	1 " " " "
#87	1	"	2 " " " "
#88	1	"	6 " " " "
#96	1	"	1 " " One stave broken. Damage 20%.
#97	1	"	1 " " To sell.
#103	1	"	1 stave broken at chime, cask flattened. "
#104	1	"	leakage at chime seams. "
#106	1	"	1 hoop off. "
#108	1	"	3 " " Three staves crushed. "
#109	1	"	Lakage at chime seams. "
#111	1	"	2 Hoops off. Damage 35%.
#112	1	"	4 " " Two staves crushed. "
#115	1	"	2 " " 1 " Broken at chime. "
#117	1	"	4 " " Head staves broken. "
#120	1	"	2 " " " " " "
#124	1	"	3 " " "
#126	1	"	5 " " "
#133	1	"	2 " " Stave broken at chime. "
#135	1	"	Staves broken at chime. "
#137	1	"	4 hoops off, head stave broken. "
#142	1	"	Leakage at chime seams. "
#144	1	"	" " " " "
#150	1	"	6 hoops off. head staves broken, worthless.
#152	1	"	3 " " To sell.
#154	1	"	2 " " one stave broken. To sell.
#157	1	"	3 " " head replaced. " "

V K

#3	-	1	cask	4	hoops	off,	To	sell.	
4	-	1	"	3	"	"	"	"	
8	-	1	"	4	"	"	"	"	
9	-	1	"	4	"	"	"	"	
10	-	1	"	1	"	"	One stave cracked, To sell.		
13	-	1	"	6	"	"	Head replaced; worthless.		
14	-	1	"	2	"	"	Two staves broken at chime.	To	sell.
15	-	1	"	2	"	"		"	"
16	-	1	"	6	"	"		"	"
18	-	1	"	Head replaced; worthless.					
19	-	1	"	5	hoops	off.	To	sell.	
20	-	1	"	7	"	"	Worthless.		
21	-	1	"	Leakage at chime seams. Damage 15%.					
22	-	1	"	4	hoops	off,	4 staves broken at chime,	to	sell.
23	-	1	"	5	"	"		"	"
24	-	1	"	6	"	"		"	"
27	-	1	"	5	"	"	Cask flattened.	"	"
28	-	1	"	3	"	"		"	"
29	-	1	"	Leakage at chime seams. To sell.					
30	-	1	"	4	hoops	off.	"	"	
31	-	1	"	3	"	"	"	"	
33	-	1	"	2	"	"	6 staves crushed.	"	"
34	-	1	"	4	"	"	1 stave broken at chime.	"	"
38	-	1	"	4	"	"	1 " " " "	"	"
39	-	1	"	3	"	"	1 " "	"	"
42	-	1	"	4	"	"		"	"
44	-	1	"	1	"	"		"	"
45	-	1	"	1	"	"	3 staves broken at chime.	"	"
49	-	1	"	1	"	"	2 " Flattened.	"	"
55	-	1	"	4	"	"		"	"
57	-	1	"	6	"	"		"	"
60	-	1	"	3	"	"		"	"
62	-	1	"	6	"	"	Worthless.		
63	-	1	"	4	"	"	5 staves crushed.	"	"

Casks against which is noted "To Sell" had the Olives contained in them too severely damaged to be used by Messrs. Austin, Nichols & Company and it was therefore agreed that they dispose of such casks to best advantage; it will be noted that very many casks had to be thus disposed of as only a few could be used by assured.

The loss at insured value and including extra charges for storage, rebrining, cartage, etc.; amounts to $5,690.36, as per our detailed statement of loss which we attach together with copy of the foreign invoice.

Assured were requested to lodge claim with the Steamship Agents, which action was taken, we also informed you of the considerable extent of damage, and understood you have informed Messrs. Harrington, Bingham & Engler, attorneys, of the damage.

KOEHLER, KEMP & KOEHLER Appraisers.

✓ LIBELANT'S EXHIBIT NO. 2

COPY

EXAMINED FOR----------Firemans Fund Insurance Co.

CONSIGNED TO----------Messrs. E. Sanchez & Co.

EX----------S.S. "ISLA DE PANAY"

FROM----------Spain, arr'd November 20, 1917.

S H I P M E N T

E S C

2509/2608 - 100 Casks Green Olives Ptas 42,064.25

On November 24, 1917 and subsequent days we called at Pier 8 East River and examined casks of the above shipment finding a number of the casks to have staves somewhat crushed and broken.

We also proceeded aboard the above steamer and examined the casks which were stowed in the lower holds of the various hatches. The casks were apparently well stowed, being tiered only two high, and the landed condition of the damaged ones, in our opinion, was attributable to rough handling; we noted especially in the #1 hatch that sling loads of other cargoes were being dragged and slid over the casks which resulted in the loosening of the hoops and also the loss of hoops on the casks, also that staves were broken and depressed where the sling loads had apparently been set down.

All the affected casks were promptly recoopered and rebrined by consignees coopers and were to be left in warehouse for a reasonable length of time, in order to permit the olives to improve. Any that still remained damaged were to be set aside by assured for our further examination.

Subsequently on January 7, 1918 we called at consignees warerooms 55 Front Street, where we examined the following:

#2537- 1 Cask - Head replaced: two hoops off - Rotted and worthless
2608- 1 " " " three " " " " " "
2569- 1 " transferred from original cask which was too severly crushed to be recoopered - Sold for $10.00

We arranged at this time that Messrs Sanchez & Co., advise us when they received additional damaged casks, as they withdrew them from warehouse.

On April 13th and May 9th we again called on them and examined the following:

#2560 - 1 Cask Bottom Bilge stave patched - Damaged 20%
2572 - 1 " Top " " " " 25%
2554 - 1 " Head Staves broken " 25%
2564 - 1 " Bottom Bilge stave patched - " 25%
2558 - 1 " Broken chime and head staves- " 25%
2530 - 1 " Side bilge stave patched - " 25%

2566 - 1	Cask	Side	Bilge	stave	patched	-	Damaged 30%
2527 - 1	"	Bottom	"	"	"	-	" 40%
2553 - 1	"	Side	"	"	"	-	" 40%
2549 - 1	"	Head	patched			-	" 40%
2559 - 1	"	Bottom	Bilge	"	"	-	" 40%
2526 - 1	"	Side	"	"	"	-	" 40%
2593 - 1	"	"	"	"	"	-	" 40%
2561 - 1	"	Bottom	"	"	"	-	" 50%
2570 - 1	"	"	"	"	"	-	" 50%

The loss at insured value amounts to $668.42 as per our detailed statement which we attach together with copy of the foreign invoice.

Assured were requested to lodge claim with the Steamship Agents, which action was taken, we also informed you of the considerable extent o f damage, and understood you have informed Messrs. Harrington, Bingham & Englar, Attorneys, of the damage.

KOEHLER, KEMP & KOEHLER

.....Appraisers.

New York, November 1, 1918.
No. 6453.

433

Statement of Loss on Olives

COPY

Account Messrs. E. Sanchez & Co.

S.S. "ISLA DE PANAY" - Arr'd November 20, 1917.

SHIPMENT

E S C

2509/2608 - 100 Casks Olives

Ptas 34,584.25

@ 22¢ - Insured Value - $7,609.00

Damaged

				Ag'd Depreo	
#2560	- 1 Cask	- 10.50 Fan @ 43 Pts	- 451.50 @ 20%	- Pts	90.30
2572	- 1 "	- 10.50 " @ 35	367.50 @ 25%		91.87
2554	- 1 "	- 10.00 " @ 43	430.00 @ 25%		107.50
2564	- 1 "	- 10.75 " @ 43	462.25 @ 25%		115.56
2558	- 1 "	- 10.50 " @ 43	451.50 @ 25%		112.87
2530	- 1 "	- 10.25 " @ 43	440.75 @ 25%		110.19
2566	- 1 "	- 10.50 " @ 43	451.50 @ 30%		135.45
2527	- 1 "	- 10.50 " @ 43	451.50 @ 40%		180.60
2533	- 1 "	- 11.00 " @ 35	385.00 @ 40%		154.00
2549	- 1 "	- 10.75 " @ 70	752.50 @ 40%		301.00
2559	- 1 "	- 10.50 " @ 43	451.50 @ 40%		180.60
2526	- 1 "	- 9.75 " @ 43	419.25 @ 40%		167.70
2593	- 1 "	- 10.50 " @ 30	315.00 @ 40%		126.00
2561	- 1 "	- 10.50 " @ 43	451.50 @ 50%		225.75
2570	- 1 "	- 10.00 " @ 35	350.00 @ 50%		175.00
				Ptas	2274.39

@ 22¢ - Insured for -Loss $500.36

Damaged
Should have produced

#2569 - 1 Cask - 10.25 Fan or 164 Gals @ 1.10 - $180.40
Did Produce 10.00
Depreciation $170.40 or 94.46%

#2569 - 1 Cask - 10.25 Fan @ 35 Ptas 358.75
@ 22¢ Insured for - $78.93
@ 94 46% - Depreciation - $74.56

Worthless

#2608 - 1 Cask - 10.75 Fan @ 20 Pts 215.00
2537 - 1 " - 10.50 " @ 20 210.00
Pts. 425.00
@ 22¢ Insured for $93.50

RESUME

Casks and agreed depreciation - $500.36
" sold 74.56
worthless 93.50
Loss $668.42

KOEHLER, KEMP & KOEHLER
.....Appraisers.

New York, November 1, 1918.
No. 6453

LIBELANT'S EXHIBIT No. 3

EXAMINED FOR ---------- #29124. Firemans Fund Insurance Company.

CONSIGNED TO ---------- Messrs. E. Tolibia & Company.

EX ---------- S/S "Isla DePanay"

ARRIVED ---------- November 20, 1917.

S H I P M E N T

A T C - 917/43 - 27 Casks Green Olives.

We were informed of damage to casks of above shipment and on December 28, called at Pier #8, East River, in company with Mr. E. Tolibia where we examined the following:-

#924 - 1 cask; 3 Hoops off. contents rotted and worthless.
#923 - 1 " 7 Staves crushed, "-"-

In addition to the above a number of casks which had sustained loss of brine were to be set aside at assured's warerooms for our further examination should it be found that the fruit still remained affected after rebrining.

Subsequently on December 27, we called at assured's warerooms, 24 Renwick Street, examining the following:-

#925 - 1 cask 2 staves crushed. Damaged 40%
#941 - 1 " 2 "-" " 50%

The above packages were the usual containers for shipment olives in brine, their landed condition and consequent damage to contents, in our opinion, was due to improper handling and/or unusual pressure of cargo.

The loss at insured value amounts to $283.22 as per our detailed statement of loss which we attach, together with copy of the foreign invoice and copy of assured's notice of damage lodged with the steamship lines in accordance with our request.

... Appraisers

New York, January 16, 1918.

#6485

JAN 16 1918

COMPAÑIA TRASATLÁNTICA

Líneas de CUBA-MÉJICO
Y
VENEZUELA - COLOMBIA

CONOCIMIENTO DE EMBARQUE N.º 3

CADIZ

D. Ronald Symmers ha embarcado a bordo del vapor español **ISLA DE PANAY**

su capitán D. _____ con destino a **NEW-YORK**

y a la consignación de Austin Nichols los efectos que al dorso se expresan,

con las siguientes

CONDICIONES

1.ª La carga se recibe al costado del buque, lo más tarde, la víspera de la salida. Los bultos deben rotularse con el puerto del destino, y sobre todo los destinados á escalas ó puntos con trasbordo.

2.ª Los fletes son pagaderos al contado. No se devolverán por ninguna causa más que por falta de cabida, sin lugar á más indemnización, ó por error de pluma ó suma.
El cargador que deje de embarcar la carga comprometida, pagará el flete como si la hubiese embarcado.

3.ª Se prohibe embarcar materias inflamables ó capaces de producir explosión.

4.ª Los cargadores son responsables civil y criminalmente de que el contenido de los bultos difiera, por ignorancia ó por malicia, de lo declarado en este conocimiento. El capitán tendrá derecho á confiscar ó destruir cualquier bulto hallado á bordo sin documentación.

5.ª Si resulta más peso ó medida que el declarado ó género perteneciente á clase superior de la tarifa, pagará doble flete del que le corresponda.

6.ª Las multas que imponga la Aduana á consecuencia de datos suministrados por el expedidor, serán satisfechas por éste y el receptor de mancomún et in solidum.

7.ª La Compañía no responde de los daños ó pérdidas producidas por la mar, los vientos, la máquina ó calderas, los abordajes, varamientos, incendios ó por cualquier causa fortuita ú ocasionada por actos, de cualquier clase y naturaleza jurídica que sean del capitán, tripulantes y barqueros, renunciando expresamente los interesados en la carga á exigirle cualquiera responsabilidad civil, directa ó subsidiaria, que nazca de las leyes, y especialmente de los artículos 587. 618 y 620 del Código de comercio y del artículo 21 del Código penal. Tampoco responde del contenido, peso y calidad de los bultos; de deterioro causado por otros géneros; de errores en la entrega de los mismos por insuficiencia ó poca claridad de las marcas, ni de la rotura de los artículos y envases frágiles. No se responde tampoco de las pérdidas, daños ó averías causadas á las mercancías por los ratones ú otros roedores. Los que contengan moneda, papel-moneda, billetes, alhajas ú objetos de valor, se embarcarán sellados, estampándose tambien el sello en el conocimiento.

8.ª Las cuarentenas y sus incidencias y gastos son de cuenta de los receptores de la carga.

9.ª También lo son las cantidades exigibles al vapor por derechos de carga ó descarga, ú otros análogos que se establezcan, entendiéndose que la Compañía puede retener la carga, como prenda pretoria, para asegurarse del cobro de fletes, gastos de desembarque ó cualquier otro que haya suplido.

10.ª El desembarque se hará por el buque, pero de cuenta y riesgo de los receptores, segun la tarifa ó costumbre de cada puerto, quedando autorizado el consignatario del buque á presentar la declaración á la Aduana con arreglo al contenido del conocimiento.

11.ª La entrega se verificará en el acto del desembarque, canjeando los bultos por los conocimientos, previo el pago del flete, en el caso de que este no hubiera sido pagado al embarque. El flete de las frutas, ajos, castañas, animales vivos y otros géneros perecederos, no podrá nunca ser á pagar en el punto del destino. No se responde de los extravíos ni daños de las mercancías que no hayan ido á recibir los interesados en el momento de ser desembarcadas. Los gastos de custodia y de conducciones serán de cuenta de dichos interesados. Se entiende que desde el momento que las mercancías han dejado la cubierta del buque, los riesgos de mar, averías, etc., corren de cuenta de los receptores.

12.ª Los bultos que no se encontrasen ó no pudiesen desembarcarse en los puertos de escala, serán llevados por el buque al punto más inmediato donde toque, y no tendrá el receptor más derecho que el de que le sean dirigidos en vapor de la Compañía ó otro cualquiera, de cuenta de la misma, pero á riesgo de aquél.

13.ª En el caso de considerarse conveniente, por motivo de guerra, bloqueo, revolución, motín, epidemia, cuarentena, ú observación, ó por avería del buque, que éste salte cualquier escala ó en el de no poder ir al puerto de su destino, podrán depositarse los géneros en el punto á donde vaya el buque, considerándose dicho depósito como entrega fin.l.

14.ª El receptor responde á prorrata del valor de sus géneros, de los gastos de salvamento de la nave que se salvasen en virtud de fallo de los Tribunales nacionales ó extranjeros, ó á consecuencia de transacción con los salvadores. En los casos de avería gruesa, se hará la liquidación extrajudicialmente por peritos y árbitros componedores y tercero en caso de discordia.

15.ª La Compañía se reserva el derecho de sustituir un vapor por otro, y no responde de que los que estén en combinación lleguen á tiempo para efectuar el trasbordo.

16.ª Si la carga destinada á trasbordarse en un punto no se trasbordase por cualquier motivo, podrá ser mandada á otro con igual objeto á expensas de la Compañía pero siendo la demora y riesgos de cuenta de los cargadores.

17.ª El vapor podrá suspender ó anticipar su salida, tocar ó dejar de tocar en cualquier puerto anunciado ó sin anunciar, tomar ó no tomar prácticos y auxiliar ó remolcar buques sin que la Compañía tenga que indemnizar ninguna clase de perjuicio. También puede trasbordar la carga á otro vapor á su costa, pero no á su riesgo, y llevar carga sobre cubierta.

18.ª Aun cuando se omita en este conocimiento la firma del cargador, se le tendrá por conforme con todas las condiciones del mismo en el hecho de recibido.

19.ª Los cargadores y receptores son responsables de las multas que las Aduanas impusiesen por las roturas y falta del precinto.

20.ª Toda reclamación ó demanda que hubiera de hacerse á la Compañía Trasatlántica, relacionada con el contrato de transporte á que se refiere el presente conocimiento, habrá de ser sometida necesariamente á los Tribunales de Barcelona, única jurisdicción que reconoce esta Compañía.

ENTREGADO AL CARGADOR _____ COPIAS DE ESTE CONOCIMIENTO.

Mod. A—1

La Compañía Trasatlántica no acepta el transporte de ninguna mercancía que se sepa pueda exponer á los buques á ser detenidos por las Autoridades Inglesas.

Recibido á bordo con las condiciones que anteceden e ignorando peso y contenido.

El Capitán,

Por razon del estado de guerra entre varias Naciones, por la presente libramos al buque y a la Compañía Trasatlántica de toda responsabilidad por cualquier acto de los gobiernos beligerantes, respecto de la carga amparada por este conocimiento.

Conforme con las condiciones que anteceden.

El Cargador,

MARCAS	NUMERACIÓN	NUMERO de bultos	CLASE de envase	CONTENIDO DECLARADO POR EL CARGADOR	Peso declarado en libras	CUBICACIÓN	TIPO DE FLETE	IMPORTE de flete y gastos P	Cts.
C.A.B. Mark	1 to 1 Numbers	156 1 pkgs	Barrels Half Barrels Cylinders	Crude Petroleum in Bulk	118.500 Ordered freight by Tons	1896 Cubic Measurement	Freight rate	1784 Amount of freight and charges	50

Admitted on board without guarantee and upon the Bill of Lading terms.
ADMÍTASE A BORDO SIN GARANTÍA Y CONFORME AL CONOCIMIENTO

El Consignatario,

Cadiz Oct. 27 de Octubre de 1917

NOTA.—Los gastos y derechos de descarga serán pagados por el receptor.
Expenses & charges for unloading will be paid by the receiver

	P		
Importe del flete.	P	1784	50
10 % capa	P	178	50
Gastos de carga	P	296	24
Impuesto de transporte.	P	92	50
Impuesto de timbres	P	21	
	P	968	
	P	1896	
	P		
A cobrar, oro.	P		
Cobrado, oro.	P	1215	15

RECIBIDO EL FLETE. Received the freight

El Consignatario,

Answer. Part of my answers are naturally based on what I can remember and another part on the reports, of my confidence in, and their own practices, of the employees of the ship, wharf, and agency. All of these answers have been given impartially and in a spirit of justice and many of them proved by experience.

J. Benjumea.

[fol. 427] Examination taken, reduced to writing, subscribed to by the witness and by the sworn interpreter, and sworn to by the witness, this twenty-fifth day of January, 1922, before: Robert Harnden, Counsel of the United States of America. Fernando Juan, Interpreter. Clifford W. McGlasson, Witness.

Fee No. 30. Fee for taking deposition 1946 words	$17.50
Fee No. 31. Fee for typewritten copy	5.25
Fee No. 32. Fee for translation	20.00
Fee No. 33. Fee for carbon copy	5.25
	$48.00

$48.00 equal to pesetas 331.20.
Consulate stamps.

(Here follow Libellants' Exhibits 1, 2, and 3, survey reports, and Claimants' Exhibit 2, bill of lading, marked side folio pages 428–436, inclusive.)

[fol. 437] CLAIMANT'S EXHIBIT 2

Face of Bill of Lading

Compania Trasatlantica. Bill of Lading No. 3. 3. (Flag.) Services of Cuba—Mexico and Venezuela—Columbia. Transshipment in Cadiz. (Stamps.) Mogador.

M. Rowlett and Pyman has shipped on board the Spanish steamer Isla de Panay, its Captain M——with destination to New York (stamp) and consigned to Austin Nichols the effects declared on back on the following

Conditions

1. The cargo is received at the side of the vessel at the latest on the day before sailing. The packages must be marked with the port of destination, and above all those consigned to ports of call, or points with transshipment.

2. The freights are payable in cash. Same will not be refunded except in case of lack of space, without any extra indemnification, or in case of a ship of the pen, or calculation. The shipper who neglects to ship the cargo engaged, will pay the freight just as if he had shipped the goods.

[fol. 438] 3. It is forbidden to ship inflammable material or material apt to cause explosion.

4. The shippers are responsible civilly and criminally if the contents of the packages are different, due to ignorance or malice, from that declared on this bill of lading. The Captain will have the right to confiscate or destroy any package found on board without documents.

5. If there results more weight or measurement than stated or articles belonging to a higher class of the tariff, double freight is to be paid.

6. The fines imposed by the customs as a consequence of the data supplied by the shipper, will be paid by him and the receiver jointly et in solidum.

7. The Company is not responsible for damages or losses caused by the sea, the winds, the machinery or boilers, collisions or stranding of the ship, fire or any unforeseen cause or occasioned by juridical acts of any class and nature of the Captain, crew or lightermen, the parties interested in the cargo expressly renouncing the right to demand any civil responsibility, direct or subsidiary, which may arise from the Laws and especially from articles 587, 618, and 620 of the Commercial Code and from article 21 of the Penal Code. Also not responsible for the contents, weight and quality of the packages; for damage caused by other goods; for errors in the delivering of [fol. 439] same caused by insufficient or illegible marking, nor for breakage of the articles and fragile containers. Also not responsible for losses, damages and average caused to the goods by rats or other rodents. Packages containing money, paper money, bills (bank notes), jewels and objects of value must be shipped sealed and this seal is also to be affixed to the bill of lading.

8. Quarantine and its incidences and fees are for the account of the receivers of the goods.

9. This also holds good for expenses for the loading or unloading the ship or other expenses which might arise, it being understood that the Company can retain the cargo as lien to secure payment of freight, unloading charges and other expenses.

10. The unloading is to be done by the vessel, however for the account and the risk of the receivers, according to the tariff or custom of each port, the agent of the vessel being authorized to present the declaration to the Customs in accordance with the contents of the bill of lading.

11. Delivery must be taken upon the unloading of the goods, the packages to be exchanged for the bills of lading after the payment of the freight in case the same has not been paid at the time of loading. Freight for fruits, garlic, chestnuts, living animals and other perishable articles can never be paid at the point of destina- [fol. 440] tion. Not responsible for misplacement nor damage to

goods that have not been received by the interested parties at the moment of unloading. Expenses for watching and transporting will be at the expense of said parties. It is understood that from the moment the goods have left the deck of the vessel, marine risks, damages, etc., are for the account of the receivers.

12. Goods which cannot be found or delivered at the ports of call will be brought by the vessel to the next point she is to touch and the receiver shall have no other right than that the goods be forwarded to him by a steamer of the company or any other steamer for the account of the Company but at his own risk.

13. In case it should be found convenient for reason of War, blockade, revolution, mutiny, epidemic, quarantine, detention or damage to the ship, that same should skip some port of call or that she could not get to her port of destination, the goods can be deposited at the port at which she calls, and this deposit shall be considered as final delivery.

14. The receiver is responsible in proportion to the value of his goods for the expenses of salvage of the ship subject to the decree of the national or foreign courts, or resulting from adjustment with the rescuers. In case of general average the liquidation will be made extrajudicially by appraisers and arbitrators and an umpire in case of disagreement.

[fol. 441] 15. The Company reserves the right to substitute one steamer for another, and is not responsible if the vessels in combination do not arrive in time for transshipment.

16. If the cargo for transshipment at a point is not transshipped for any reason, same may be forwarded by another ship with the same destination at the expense of the Company, delay and risks however to be for the account of the shippers.

17. The ship may suspend or anticipate sailing, call or not call at any port announced or not announced, take or not take pilots and assist or tow vessels with the Company having to pay damages of any nature. The Company can also transship the cargo to another vessel at its own expense but not at its own risk and also can carry cargo on deck.

18. Even though this bill of lading is not signed by the shipper, the shipper, by taking this bill of lading, agrees to all the conditions of same.

19. The shippers and receivers are responsible for the fines imposed by the Customs for broken and missing seals.

20. All claims or demands against the Compania Trasatlantica with reference to the contract of transportation contained in this bill of lading must necessarily be submitted to the Courts of Barcelona, [fol. 442] the only jurisdiction recognized by this Company.

Delivered to the shipper copies of this bill of lading.

The Compania Trasatlantica will not accept the transportation of any merchandise that will render the steamers liable to detention by the British authorities.

Received on board on the above conditions and ignoring weight and contents.

By reason of the state of war between the various nations, by these presents we free the ship and the Compania Trasatlantica from all responsibility for any act of the belligerant government in respect to the cargo covered by this bill of lading.

Above conditions accepted.

The Captain. A. Pastrana.

Stamp.

Reverse Side of Bill of Lading No. 3

Marks	Numbers	No. of packages	Kind of packages	Contents declared by the shipper	Weight declared in kilos
C A T	1/158	158	Casks	Olives	118500

Cubication	Freight rates	Amount of freight and expenses P. C.
198'60	40 c/m	7584.

[fol. 443] Amount of freight P	7,584.
10% primage	758.40
Loading expenses Wharfage	296.25
Transportation charges	592.50
Stamp Tax	25.
Discharge in New York 5 c/m	948.
Extra freight	1,896.
Collected, gold P	12,100.15

To collect, gold P. Freight Paid. (Stamp.)
Received the freight.

The Agent for the Steamer.

To be received on board without guaranteeing space.
The Agent of the Steamer: —— ——.
Round Stamp.
Compania Trasatlantica, Sevilla Agency.
Sevilla, October 27, 1917.

NOTE.—The expenses and duties on discharge shall be paid by the consignee.

[fol. 444] CLAIMANT'S EXHIBIT 11

Copy of the Protest of the Spanish Steamer Isla de Panay

New York, November 30th, 1917.

The undersigned Mr. Francisco Javier de Salas, Consul General of Spain in New York Certifies: That in the Book of Marine Protests of this Consulate General, corresponding to the present year, and on page number sixty-one, there is an entry which copied reads as follows: "Number sixty-one. In the City State and County of New York, on the twenty-first day of November nineteen hundred and seventeen. Before me, Mr. Fernando Ruiz de Toledo, Licentiate in Civil and Legal Rights and Vice-consul of Spain in New York, and in the presence of the instrumental witnesses hereinafter mentioned, appeared: Mr. A. Muslera, Captain of the Spanish steamer "Isla de Panay" of the maritime register of Barcelona and property of the Compania Trasatlantic Espanola, who in my judgment has the necessary and legal capacity for this act, freely and expontaneously declares: That for the purposes it may serve, he formulates the present act of sea damages and relates so that I may state therein the following: That at five hours of the day's run from the fifth to the [fol. 445] sixth instant, ready and provided of everything with the mails aboard, we sailed from the port of Cadiz for that of New York with light N. W. winds and rolling sea; at thirteen hours sighted two vessels who were signaling, heading for them it resulted in being twenty survivors of the Danish steamer "Kai." At fourteen hours, the rescue being effected it was agreed at an officers' meeting to return to Cadiz to land the survivors; at twenty-three hours of the day's run of the fifth to the sixth, nearing Cadiz we transferred the survivors to the auxiliary, as well as the two boats in which they were found, continued our voyage without incident until the day's run of the eleventh to the twelfth when the wind is fresh from the S. W. and heavy rolling seas from same, with decline in the barometer; the ship pitches and rolls shipping some spray; The bilges are pumped as increased quantity of liquid having been noticed. The ship suffers in all its parts, frequently shipping large seas, and continuing in this manner until the end of the following day's run from the twelfth to the thirteenth. On the thirteenth to the fourteenth the bad weather continues but on the fourth watch, the barometer shows tendencies of rising, the day's run ending without incident. On the day's run of the fifteenth to the sixteenth and during the fourth watch the wind is strong with heavy seas from same, the ship rolling heavily and shipping seas, and continuing in this manner during the day's run of the sixteenth to the seventeenth and the seventeenth to the eighteenth, continuing without incident until twenty-three [fol. 446] hours of the day's run of the ninteenth to the twentieth when the pilot was taken aboard and being admitted to port at twenty-four hours. And with the view not to cause any damage to the declaring Captain, for the damages that the ship of his command may have suffered, as well as to the cargo in his care, he makes the

necessary protests by rights, against the wind, the sea and other elements, as well as against the shippers, consignees, insurers, and all else who may concern, reserving the right, which in case of disagreement, the laws grant him. And affirming and ratifying all of the declared and protested in the presence of the instrumental witnesses that were present who were Mr. M. Corvera and Mr. J. M. de Miguel, first and second officers respectively of the aforesaid ship, who declare to be true the manifestations made by the appearing Captain, as per the log book, the corresponding pages of which have been stamped by this Consulate General. Having been advised by me, those present, of the privilege that the law conceeds them in reading for themselves this public instrument, and having renounced same, at their request I did so in a loud voice, all stating that they know its contents, which they affirm and ratify; In witness whereof and in the presence of the Captain and witnesses, I the Vice-consul, as Notary of this Consular district sign this instrument. "(Signed) The Captain, A. Musleras, The First Officer, M. Corvera, The Second Officer, J. M. de Miguel. Before me, The Vice-consul, Fernando [fol. 447] Ruiz de Toledo." There is a stamp in blue ink that reads "Consulate General of Spain, New York". It is an exact copy of the original; and so that it may be proved, I issue the present in New York, on the thirtieth of November of Nineteen hundred seventeen.

The Consul General.

(Signed) Francisco Javier de Salas.

There is the Consulate official stamp, and stamp for number and fee.

(Here follows Claimant's Exhibit 12, cargo plan, marked side folio page 448)

[fol. 449] CLAIMANT'S EXHIBIT 13

3—22—18· J. F. Joseph Y. de Terry

Exhibit No. 2

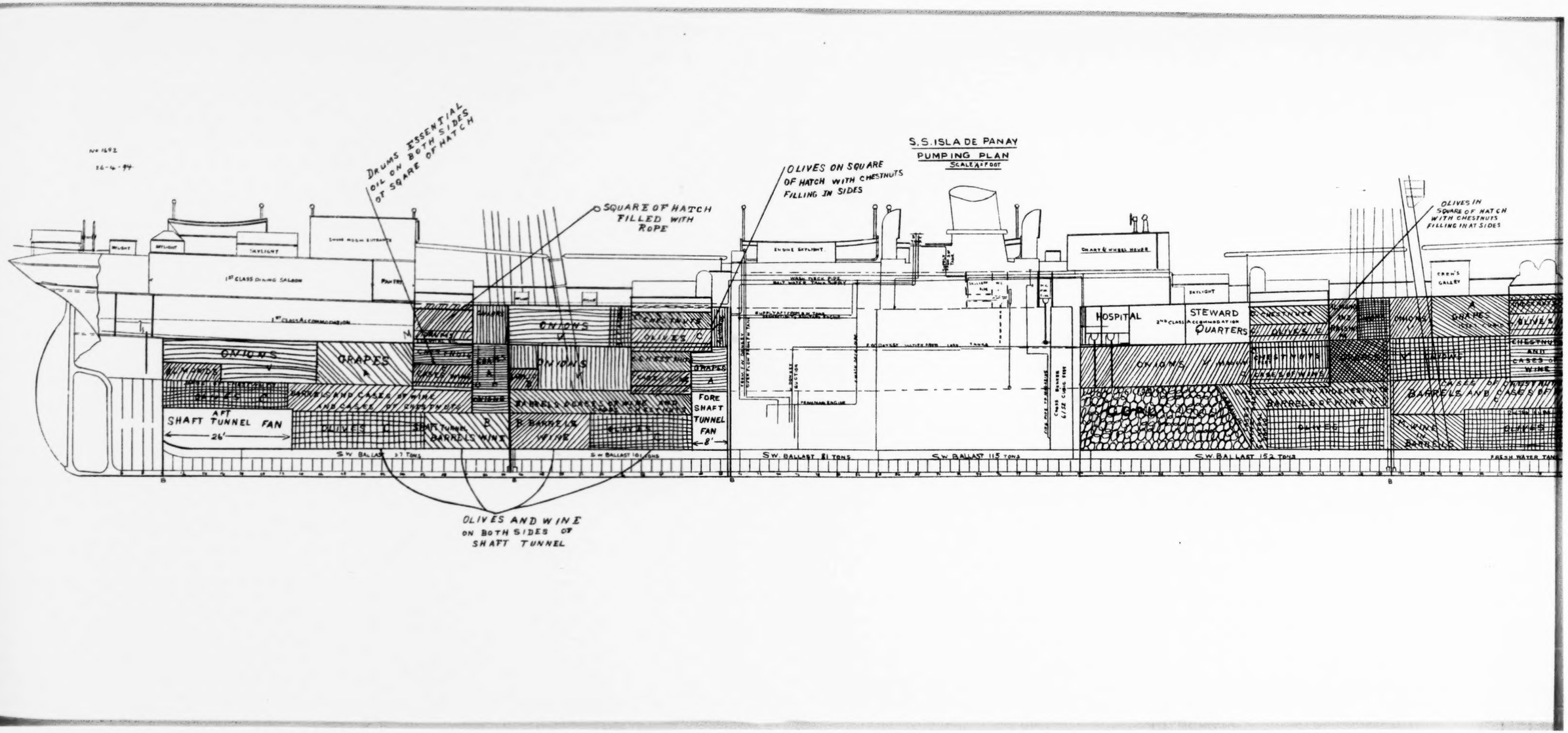
Robert Harnden, Consul of the U. S. of America

Seville, November 8, 1917.

Compania Trasatlantica, Sevilla.

MY DEAR SIRS: I address the present to you, as requested, with the view that you may have record, that if the shipment of olives composed of E. S. C. 146 casks, shipped by me on the steamers of your Company "Alicante" and "Isla de Panay" should be damaged, which in the judgment of experts, may be caused by insufficiency of containers, I relieve the company of all responsibilities, if the damage is occasioned by the aforesaid cause.

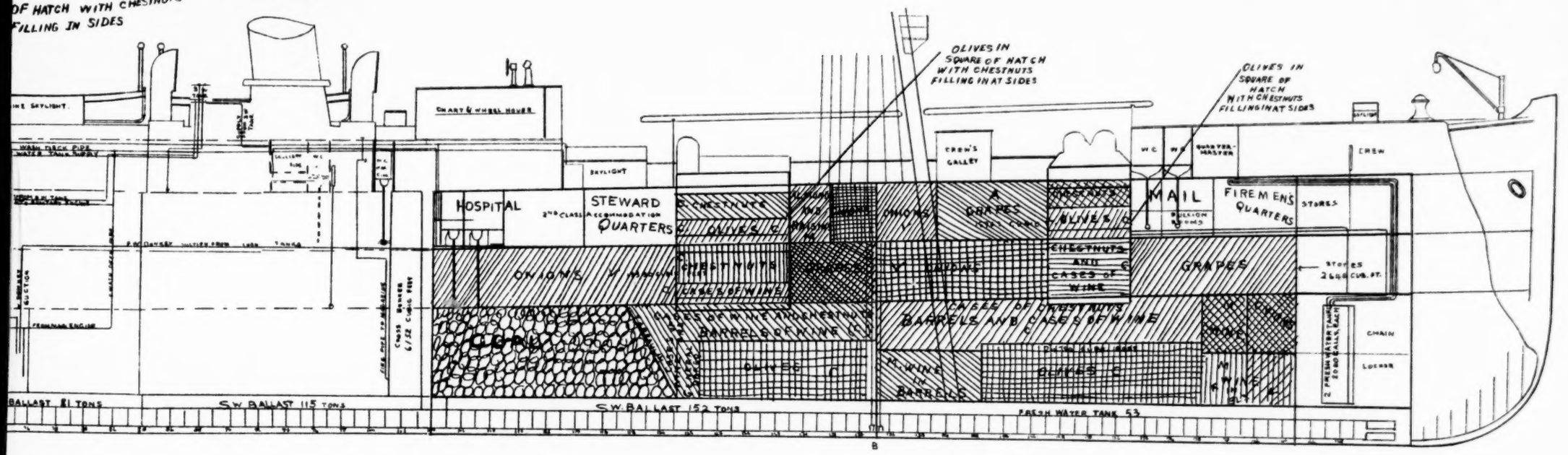
Yours very truly, J. M. Panay.


No 1692
16-6-94
S.S. ISLA DE PANAY
PUMPING PLAN
SCALE 1/8 FOOT
DRUMS ESSENTIAL OIL ON BOTH SIDES OF SQARE OF HATCH
SQUARE OF HATCH FILLED WITH ROPE
OLIVES ON SQUARE OF HATCH WITH CHESTNUTS FILLING IN SIDES
OLIVES IN SQUARE OF HATCH WITH CHESTNUTS FILLING IN AT SIDES
1ST CLASS DINING SALOON
1ST CLASS ACCOMMODATION
ENGINE SKYLIGHT
CHART & WHEEL HOUSE
HOSPITAL
2ND CLASS ACCOMMODATION
STEWARD QUARTERS
CREW'S GALLEY
ONIONS V
GRAPES A
OLIVES C
CHESTNUTS
BARRELS AND CASES OF WINE
AFT SHAFT TUNNEL FAN
26'
SHAFT TUNNEL BARRELS WINE
FORE SHAFT TUNNEL FAN
8'
SW BALLAST 37 TONS
SW BALLAST 101 TONS
SW BALLAST 81 TONS
SW BALLAST 115 TONS
SW BALLAST 152 TONS
FRESH WATER TANK
OLIVES AND WINE ON BOTH SIDES OF SHAFT TUNNEL

S.S. ISLA DE PANAY

PUMPING PLAN

SCALE ⅛" FOOT



[fol. 450] CLAIMANT'S EXHIBIT 14

3—22—18. J. F. Rowlett & Pyman

Exhibit No. 3

Robert Harnden, Consul of the U. S. of America

Sevilla, November 5, 1917.

Compania Trasatlantica, Sevilla.

MY DEAR SIRS: With reference to the shipment of 227 casks of olives that we are making by the steamer "Isla de Panay" to New York, we understand that that Company considers the containers insufficient and that it does not accept responsibility for the damages that they suffer as natural consequences of the voyage.

And as guarantee of that Company, we sign the present, as you have delivered us clean bills of lading.

Yours very truly, Roulett & Pyman.

[fol. 451] CLAIMANT'S EXHIBIT 15

3—22—18. J. F.

Exhibit No. 4

Robert Harnden, Consul of the U. S. of America

Sevilla, November 5, 1917.

Manager of the Compania Trasatlantica.

DEAR SIR: To relieve the responsibility that may fall on that Company, I declare that they are used, the 27 casks shipped on the Mogador, to be transshipped to the Isla de Panay, at Cadiz, with destination to New York, so long as you have put no notations on the bills of lading.

Yours very truly, P. O. de Juan Tolibia.

[fol. 452] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO LIBEL AND CASE OF TOLIBIA & COMPANY

It is hereby stipulated and agreed that a libel by E. Tolibia & Company, a copy of which is hereto annexed, may be filed in the

United States District Court and that the suit brought thereby by E. Tolibia & Company may be tried with the above entitled actions, without prejudice, however, to any defenses which the claimant may have herein as regards the claim of E. Tolibia & Company.

[fol. 453] It is further stipulated and agreed that all testimony heretofore taken either by deposition or under Commission, may be read in evidence by either party in the suit of E. Tolibia & Company against the steamship "Isla de Panay," subject to whatever objections can be taken to the said original testimony, with the same force and effect as if the shipment of 27 casks of olives, the subject thereof, had been specifically referred to in the testimony taken in the above entitled actions.

Dated, New York, September 28, 1922.

Hunt, Hill & Betts, Proctors for Claimant. Bigham, Englar & Jones, Proctors for Libellants.

[fol. 454] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

OPINION, AUGUSTUS N. HAND, D. J.

AUGUSTUS N. HAND, District Judge: Libellants are consignees of shipments of olives under clean bills of ladings. The bills of lading were signed in Seville, Spain, and the olives were loaded on the ship at Cadiz. These bills did not in terms contain any statement as to the [fol. 455] apparent condition of the goods shipped and embraced a clause that the ship should not be responsible for "breakage of the articles and fragile containers."

I think the great weight of evidence is to the effect that the chestnut casks containing the olives were old and insufficient at the time the merchandise left Seville for transshipment to claimants' vessel at Cadiz. The steamship agents distrusted the containers and insisted upon an agreement of indemnity as a condition of carrying the merchandise under clean bills of lading, which seems to have been given at Seville. There is no evidence of bad stowage or really unusual weather, or of an unseaworthy vessel, but the evidence is quite to the contrary. Nor is there proof of any handling by the stevedores at New York which should cause damage if the olives had been in proper casks.

The libellants paid drafts accompanying the bills of lading without knowledge that the containers were old and insufficient. If there is any liability here for damages it is upon the theory that by failing to note in the bills of lading any insufficiency in the containers, the steamship misled the libellants to their injury and is now estopped under the doctrine of Higgins v. Anglo-Algerian Steamship Co., 248 Fed. 386, to claim that the containers were insufficient. In that case,

however, there was in the bill of lading an express representation that the merchandise itself was in apparent good order and condition, when it was known to be injured by rain water. Here the par-[fol. 456] ties believed doubtless that the olives would go through, but the ship's agents were not willing to take the risk of any liability which might arise from old casks. No case has gone so far as to hold that a bill of lading containing no words representing the condition of the containers would give rise to an estoppel. The Harter Act expressly provides that the vessel shall not be liable for any "insufficiency of package."

The libels are dismissed with costs.

A. N. H., D. J.

October 23, 1922.

[fol. 457] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE

(Austin Nichols & Co.)

The above entitled action having come on to be heard on the pleadings and proofs adduced by the respective parties and having been argued and suubmitted, and due deliberation having been had thereon, and the Court having handed down its decision in writing dismissing the libel herein against the steamship "Isla de Panay," its claimant and stipulators for costs and value, and the costs of the [fol. 458]claimant herein having been taxed in the sum of $625.42, it is, on motion of Hunt, Hill & Betts, proctors for the claimant,

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed, and it is further

Ordered, adjudged and decreed that the claimant, Compania Trasatlantica, have and recover from Austin Nichols & Co., Inc., the libellant herein and its stipulators its costs as taxed in the sum of $625.42, and that the said claimant have judgment and execution for $625.42 against the libellant, Austin Nichols & Co. Inc. and its stipulators for costs, with interest thereon from the date of the entry of the decree herein until paid, and it is further

Ordered that unless this decree be satisfied or an appeal be taken therefrom within twenty days after the service of a copy hereof, with notice of entry, upon the proctors for the libellant herein, the libellant and its stipulators for costs show cause before this Court within four days or upon the first day of jurisdiction thereafter why execution should not issue against them, their goods, chattels and lands to satisfy this decree.

Augustus N. Hand, U. S. D. J.

[fol. 459] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE

(Sanchez & Company)

The above entitled action having come on to be heard on the pleadings and proofs adduced by the respective parties and having been argued and suubmitted, and due deliberation having been had thereon, and the Court having handed down its decision in writing dismissing the libel herein against the Steamship "Isla de Panay," its claimant and stipulators for costs and value, and the costs of the [fol. 460] claimant herein having been taxed in the sum of $70.70, it is, on motion of Hunt, Hill & Betts, proctors for the claimant,

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed, and it is further

Ordered, adjudged and decreed that the claimant, Compania Trasatlantica, have and recover from Eug. Sanchez and Jose Gilde Sagredo, copartners trading as E. Sanchez & Co., the libellants herein and their stipulators, its costs as taxed in the sum of $70.70, and that the said claimant have execution for $70.70 against the libellants, Eug. Sanchez and Jose Gilde Sagredo, copartners trading as E. Sanchez & Co., and their stipulators for costs with interest thereon from the date of the entry of the decree herein until paid, and it is further

Ordered that unless this decree be satisfied or an appeal be taken therefrom within twenty days after the service of a copy hereof, with notice of entry, upon the proctors for the libellants herein, the libellants and their stipulators for costs show cause before this Court within four days or upon the first day of jurisdiction thereafter why execution should not issue against them their goods, chattels and lands to satisfy this decree.

Augustus N. Hand, U. S. D. J.

[fol. 461] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE

(Tolibia & Company)

The above entitled action having come on to be heard on the pleadings and proofs adduced by the respective parties and having been argued and submitted, and due deliberation having been had thereon, and the Court having handed down its decision in writing dismissing the libel herein against the Steamship "Isla de Panay," [fol. 462] its claimant and stipulators for costs and value, and the

costs of the claimant herein having been taxed in the sum of $25.00, it is on motion of Hunt, Hill & Betts, proctors for the claimant,

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed, and it is further

Ordered, adjudged and decreed that the claimant, Compania Trasatlantica, have and recover from E. Tolibia & Co., the libellant herein and its stipulators, its costs as taxed in the sum of $25.00 and that the said claimant have judgment and execution for $25.00 against the libellant, E. Tolibia & Co., and its stipulators for costs, with interest thereon from the date of the entry of the decree herein until paid, and it is further

Ordered that unless this decree be satisfied or an appeal be taken therefrom within twenty days after the service of a copy hereof, with notice of entry upon the proctors for the libellant herein, the libellant and its stipulators for costs show cause before this Court within four days or upon the first day of jurisdiction thereafter why execution should not issue against them, their goods, chattels and lands to satisfy this decree.

Augustus N. Hand, U. S. D. J.

[fol. 463] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONSOLIDATING CASES

On reading and filing the stipulation of the proctors for all the parties herein consenting hereto, dated November 24th, 1922, and [fol. 464] on motion of Bigham, Englar & Jones, proctors for libellants, it is

Ordered and adjuged that the above causes be, and the same hereby are, consolidated on appeal to the Circuit Court of Appeals from the decrees of the United States District Court dismissing the libels herein for all proceedings connected with said appeal, and it is further

Ordered and adjudged that one record may be used for all the appeals herein.

J. W. Mack, U. S. C. J

[fol. 465] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

EUG SANCHEZ and JOSE GILDE SAGREDO, Copartners, Trading as E. Sanchez & Company,

against

The Steamship "ISLA DE PANAY," Her Engines, etc.

AUSTIN NICHOLS & COMPANY, INC.,

against

The Steamship "ISLA DE PANAY," Her Engines, etc.

E. TOLIBIA & COMPANY

against

The Steamship "ISLA DE PANAY," Her Engines, etc.

Stipulation Consolidating Causes

It is hereby stipulated and agreed that the libellant, E. Sanchez & Company is a co-partnership, composed of Eug. Sanchez and Jose Gilde Sagredo; that libellants Austin Nichols & Company, Inc., and E. Tolibia & Company, are corporations, as set forth in the respective libels, that the libellants in the several causes, owned the olives mentioned in said libels at the time of the delivery of said olives to the [fol. 466] said libellants at New York by the claimant of the Steamship "Isla de Panay," and that all these cases were tried on the same proof, which is to be considered as evidence in each of said causes.

It is further stipulated that these causes be consolidated on appeal to the Circuit Court of Appeals from the decree of the United States District Court dismissing the libels herein, for all proceedings connected with said appeal, and that one record be used for all the appeals herein.

Dated, New York City November 24th, 1922.

Bigham, Englar & Jones, Proctors for Libellants. Hunt, Hill & Betts, Proctors for Claimants.

[fol. 467] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL

Please take notice that the libellants above named, Austin Nichols & Company, Eug. Sanchez and Jose Gilde Segrado, copartners trad-

ing as E. Sanchez & Company and E. Tolibia & Company, and their stipulator for costs, Royal Indemnity Company, hereby severally appeal from the final decrees made and entered hereto on the 9th day of November, 1922, to the United States Circuit Court of Appeals for [fol. 468] the Second Circuit, to be held in and for the said Circuit at the City of New York, in the Southern District of New York, as well as from each and every part of said decrees.

Dated New York, November 29th, 1922.

Yours, &c., Bigham, Englar & Jones, Proctors for Libellants-Appellants, Office & Post Office Address No. 64 Wall Street, Borough of Manhattan, New York City.

To Messrs. Hunt, Hill & Betts, Proctors for Appellee, Office & P. O. Address No. 120 Broadway, New York City. Alex. Gilchrist, Jr. Esq., Clerk of the U. S. District Court Southern District of New York, Post Office Building, New York City.

[fol. 469] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR

The libellants above named hereby assign errors in the rulings, proceedings, decision and final decree of the District Court herein as follows:

First. In that the District Court entered decrees dismissing the libels herein.

Second. In that the District Court failed to find that the casks and their contents were damaged by the negligent handling of the [fol. 470] ship's stevedores.

Third. In that the District Court failed to hold the claimant strictly to the burden of proof which was upon it to bring itself under the exceptions in the bill of lading.

Fourth. In that the District Court found contrary to the evidence as adduced by the claimant itself that the claimant believed that the casks would probably "go through" or stand transportation from Seville to Cadiz, trans-shipment at Cadiz and transportation thence to New York.

Fifth. In that the District Court failed to find that the claimant believed at the time the olives were received for shipment that the casks were insufficient.

Sixth. In that the District Court gave the benefit to the claimant of the provision in the Harter Act that the vessel shall not be liable for

"insufficiency of package" while neglecting to hold the claimant responsible for its violation of the express provision of the Harter Act that the carrier must furnish a bill of lading containing a statement as to the apparent condition of the goods when received for shipment.

Seventh. In that when the shipowner issued a bill of lading which contained no notations as to bad order and condition, the consignee [fol. 471] was justified in accepting such a bill of lading as a clean bill of lading.

Eighth. In that the District Court failed to hold that the claimant was guilty of fraud in issuing a clean bill of lading upon receipt of goods which it knew were in bad order and in an unsafe and improper condition for transportation.

Ninth. In that the District Court held that the absence of "words representing the condition" of the containers distinguished this case from the case of Higgins against Anglo Algerian Co., 248 Federal 386.

Tenth. In that the District Court failed to find that the acceptance of letters of indemnity by the claimant as a condition of the issuing of clean bills of lading was conclusive evidence of fraud on the part of the claimant which resulted in the injury the libellants complained of ,libellants being, as found by the Court, bona fide holders for value of the bills of lading.

Eleventh. In that the District Court failed to find that the participation by the claimant in this fraud against the libellants excluded them from all benefit from exceptions in their favor contained in the bill of lading.

Twelfth. In that the District Court failed to find that the wilful and intentional concealment by the claimant of the visible, open and [fol. 472] apparent bad condition of the containers which was known to them and unknown to the libellant was a fraud upon the libellants which renders them liable to the libellants for the damage to the contents of the casks resulting from such open and apparent bad condition, the knowledge of which they purposely concealed from the libellants.

Thirteenth. In that when the claimant described the shipment as casks of olives, the libellants were justified in assuming that they were casks of olives in apparent good order and the claimant is estopped to deny that they were in good order when shipped.

Fourteenth. In that the following rulings of the District Court were clearly erroneous:

Testimony of Charles A. Thayer, witness for libellant, Department Manager for libellant, Austin Nichols & Company, Inc., on direct examination (Stenographer's Minutes of the Trial p. 11):

"Q. From your experience, will you express an opinion as to the probable cause for the damage you saw?

Objected to as calling for a conclusion and on the ground that counsel has not qualified this man as an expert on stowage.

Objection sustained.
Exception."

[fol. 473] Direct examination of libellant's witness, Collins Chivers, cooper for libellant, Austin Nichols & Company, Inc., (Stenographer's Minutes p. 37):

"Q. From your experience, to what should you attribute the damage that you noticed in the hold?

Objected to as calling for a conclusion.
Objection sustained.
Exception."

Stenographer's Minutes p. 41:

"Q. From your experience in handling and inspecting these shipments to what possible causes would you attribute the damage to these olives?

Objected to as calling for a conclusion.
The Court: I think that is pretty vague, but he may answer the question though it is just a matter of argument.
Exception.

A. Well, I have seen the barrels being loaded on the ships, and the taking of the barrels off the dock in the draft; sometimes they bang against the side of the ship, doing considerable damage along these lines. Of course a cooper's business is to tally those articles right into the hatch if any of them are damaged—I have seen the chimes [fol. 474] being broken by the draft going on up into the ship and banging against the side of the ship and breaking the chimes. I have seen that done repeatedly and I have had to send men into the hatch to see that they are recoopered.
Q. How about discharging olives?
A. In discarging olives the same thing can occur.

Mr. Crandall: I move to strike all this out.
Motion granted.
Exception.

Fifteenth. In that the District Court refused to enter decrees in favor of these libellants for the damage sustained by them by reason of the injury to this cargo as set forth in the pleadings herein, with interest and costs, and did not adjudge the S. S. "Isla de Panay" and the claimant herein at fault and liable for such injury.

Dated, New York, November 29th, 1922.

Bigham, Englar & Jones, Proctors for Libellants-Appellants, Office and P. O. Address No. 64 Wall Street, Borough of Manhattan, New York City.

[fol. 475] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated that all exhibits except those contained in the foregoing record may be omitted from the transcript herein, but the same may be used on the argument with the same force and effect as though printed herein. Further that the bills of lading are all of the same form and contents (with necessary changes in names and [fol. 476] amounts), as the ones reproduced in the foregoing record.

Dated, January 29, 1923.

Bigham, Englar & Jones, Proctors for Appellants. Hunt, Hill & Betts, Proctors for Appellee.

[fol. 477] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, February —, 1923.

Bigham, Englar & Jones, Proctors for Appellants. Hunt, Hill & Betts, Proctors for Appellee.

[fol. 478] UNITED STATES OF AMERICA,
Southern District of New York, ss:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District [fol. 479] of New York, this — day of February in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-seventh.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 480] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

AUSTIN NICHOLS & COMPANY, Libellant-Appellant,

v.

Steamship "ISLA DE PANAY," Her Engines, etc., Compania Transatlantica, Claimant-Appellee.

EUG. SANCHEZ and JOSE GILDE SAGREDO, as Copartners, etc., Libellants-Appellants,

v.

THE SAME

E. TOLIBIA & COMPANY, Libellant-Appellant,

v.

THE SAME

OPINION, ROGERS, C. J.

[fol. 481] These causes come here on appeal from the United States District Court for the Southern District of New York.

ROGERS, Circuit Judge: These are three libels filed against the steamship Isla de Panay. Austin Nichols & Company, the libelant in the first case, is a corporation organized under the laws of the State of New York, and has an office and place of business in the Borough of Manhattan, City of New York. In its libel it alleges that on October 27, 1917, one Pyman shipped and placed on board the steamship at the port of Cadiz, Spain, 227 packages of olives in good order and condition to be carried by the steamship as a common carrier from the Port of Cadiz to the Port of New York, there to be delivered in like good order and condition as when shipped to the libelant. It alleges that the ship arrived in New York in November, 1917, and discharged her cargo, but not in like good order and condition as when shipped, but badly damaged. The libelant claims that by reason of the premises it has sustained damages in about the sum of $11,000. It, therefore, asks the court to decree to libelant its

[fol. 482] damages with interest and costs, and that the steamship be condemned and sold to satisfy the same.

Sanchez & Company, the libelant in the second case, is a copartnership doing business in the Borough of Manhattan, in the City of New York. In its libel it alleges that on October 27, 1917, one de Ferry shipped and placed on board the steamship at the Port of Cadiz, Spain, 100 packages of olives, likewise in good order and condition, to be carried by the steamship as a common carrier from the Port in Spain to the Port of New York, and there delivered to the libelant in like good order and condition as when shipped. It alleges that delivery was made in November, 1917, but not in like good order and condition as when shipped, but badly damaged. The libelant alleges it has sustained damages in the sum of about $1,800.00, for which a decree is asked as in the first action.

E. Toliba & Company, the libelant in the third case, is a corporation organized under the laws of the State of New York. It has its office and place of business in the City of New York. It alleges that on October 27, 1917, there were shipped on board the Steamship in the Port of Cadiz 27 packages of olives in good order and condition, to be carried as a common carrier from the Port in Spain to the Port of New York, and there delivered to the libelant in like good condition as when shipped. It alleges delivery in damaged condition and asks [fol. 483] damages in the sum of $500, and a decree against the ship as in the other two actions was prayed.

The court below dismissed the libels with costs having found that the great weight of evidence showed that the chestnut casks containing the olives were old and insufficient at the time of shipment. The court also found that there was no evidence of bad stowage, of unusual weather or of an unseaworthy vessel.

The three cases were tried on the same proof in the court below, and after decree the proctors stipulated that the causes be consolidated on appeal to this court and be heard on one record, and an order to that effect was duly entered.

The bills of lading issued for the casks of olives were issued at Seville by the Captain of the Mogador. They were not signed at any time by the Captain of the Isla de Panay. The latter only signed for the freight that was delivered direct at Cadiz. The casks of olives were delivered to the Line direct at Seville and brought from there on the Mogador down to Cadiz on the river Guadalquivir, a distance of about 70 or 80 miles. At that point the casks were unloaded from the Mogador to the Panay. The bills of lading issued when the casks were put on the Mogador at Seville were never presented to the Captain of the Panay who testified that "The bills of lading from Seville were never presented to me." He was examined as to the usual method of procedure at Seville—it appearing that he [fol. 484] at one time had been captain of the Mogador running between Seville and Cadiz. He stated that the captain in command at Seville was not under obligations to put notations on the bills of lading as to the condition of the goods where letters of guarantee were given relieving the ship of responsibility. In the present suit no letters of guaranty were given to the Captain of the Panay at Cadiz.

They had been given to the Captain of the Mogador at Seville when the casks were placed on that vessel. The explanation given of the letters of guarantee was as follows:

"If the bills of lading are issued with a note on them the insurance companies or the bankers in Spain will not accept that bill of lading on account of the condition in which the goods are, but if they have no clause on it they will pass it to a banking house and the insurance company that they have been shipped by the shipper in apparent good order and condition, although they have issued a letter of guarantee relieving the company of any responsibility whatsoever for the condition of the packages."

The letters of guarantee were three, one for each shipper in these suits, signed by the shippers or some one representing them. They are referred to more fully in another part of this opinion.

The Captain of the Panay never saw the guarantees until he saw [fol. 485] them in New York. He never had the bills of lading and never had the guarantees in his possession at Cadiz.

The Captain of the Panay was asked whether he made any notation of the condition of the casks on the bills of lading when the olives were received on his vessel at Cadiz, and he said he did not "because they were through ladings from Seville" but that he made notations of their condition on the shipping orders.

The Panay arrived at Cadiz on November 4th at 2 o'clock in the afternoon and sailed at 5 o'clock in the afternoon of the next day. While at Cadiz the ship took on board 354 casks of olives consigned to the libelants. These casks had been brought from Seville on the Mogador, a boat which belonged to the same line to which the claimant belongs. The Mogador left Seville on the morning of the day she arrived at Cadiz the trip occupying about eight hours. The Captain of the Steamship testified that he observed the casks as they were lying on the lighters and that he saw "they were very old, that the hoops were old and rusty, that the heads were warped," and the casks "were in very bad condition:" The hoops he said "were rusty, would break off; if you just touched them they would fall off." The heads of the casks were "warped and deformed, and as the hoop broke off, the weight of the cask being so great, heads would pop out." Asked as to whether they were proper containers for olives, he said: "they were very bad." He thought the casks might have been 20 [fol. 486] years old, and he had never seen casks as old as those here involved, and had never seen hoops as rusty. He had never seen hoops "in such an extraordinary state." When asked as to their condition when they reached New York and were put on the dock he said:

"Saw some of the casks, you touch them only and the hoops would come off and the head would come out and the olives would come all over the dock, they were shoveled back into the casks and set on their heads, put the hoops around them, salt and water, put the head back in order to try to preserve the olives. Out of every two that were unloaded one would come apart."

And the Chief-officer of the ship, who had charge of the stowage of the cargo, testified as follows:

"Q. When did you first see the bills of lading in this case?
A. Here.
Q. Did not the ship have a copy of them?
A. These are the first ones that I saw. The copies that the ship has are from Cadiz.
Q. Where did you get them?
A. They did not give me any.
Q. What is your usual custom; do you not have a set of bills of lading handed to you on board the ship when the cargo is turned over to you?
A. In Cadiz they use a shipping order. * * *
[fol. 487] Q. And when the cargo comes on and these different consignments arrive on board, do you not receive copies of the bills of lading to check up the packages, and so on?
A. In other ports they do, but not at Cadiz."

His testimony fully corroborated that given by the Captain as to the condition of the casks when they were loaded on the steamship at Cadiz. An excerpt from his tetsimony follows:

"Q. When you saw this cargo going on board the Isla de Panay at Cadiz were all these casks in bad condition?
A. Nearly all.
Q. That is, talking the entire shipment of three hundred and some odd casks, they were practically all in bad condition from what you saw, is that correct?
A. Yes, the majority.
Q. How many casks would you say were in bad condition?
A. 300 of them, some odd.
Q. Assuming that there were 354 altogether, how many out of the 354 would you say were in bad condition as you have described here?
A. Nearly all.
Q. 354 or 325 or what?
A. About 325."

The casks were made of chestnut wood instead of oak. The testimony shows that such casks are much inferior to those made of oak. [fol. 488] The chestnut casks are invariably accompanied with heavy leakage of the brine, and the brine causes the chestnut wood, which is softer than oak and more brittle, to become soggy. When it gets soggy and saturated the staves crack, the hoops rust and the staves open and the brine runs out.

The casks were carefully stowed on the Steamship none of them being stowed more than two tiers high. They arrived at New York in the same position as when they were stowed at Cadiz. They had not moved. The inspectors of cargoes and cargo surveyors testified that the stowage was customary and proper. One of them said: "It is excellent stowage. It is rather better than is usual." They were also asked as to the taking of the casks out of the vessel when she arrived at New York, and whether they had any fault to find with it

and said: "None whatever." Another said the stowage was perfectly justified.

In the instant cases the bills of lading, paragraph 7, state: "The Company is * * * not responsible for the contents, weight and quality of the packages; * * * nor for breakage and fragile containers. * * *" in the present cases the shippers in effect contracted that they would stand the loss arising from the breakage and, as we think, of the insufficiency of the containers. This cannot relieve the ship from liability for damage resulting from negligence in stowage or in handling or care of merchandise committed to its charge. Gilchrist Transportation Company v. Boston Insurance Com-
[fol. 489] pany, 223 Fed. 716. But we are in full accord with the court below that in the instant cases the stowage was proper and that the handling of the cargo was free from negligence.

It appears that the vessel met with no unusual weather during the voyage. The highest wind force recorded was seven on the Beaufort scale. The chief officer of the ship testified that the ship encountered the usual November weather. "Moderate whether, not very bad." No evidence of negligent stowage was offered. The libelants rested chiefly upon th-ir contention that as it must have been apparent that the containers were insufficient at the point of shipment, a notation to that effect should have been made upon the bills of lading, and that issuing clean bills of lading in consideration of the guarantee of the shippers to hold the claimant harmless should any damage occur to the goods while on the voyage, a fraud had been committed upon the libelants, alleged to be innocent holders of the bills of lading, and the claimant was, therefore, estopped from raising the defense of insufficient containers.

It is to be kept in mind throughout this opinion that these suits are not in personam against the owners of the vessel but they are in rem against the ship. If a libelant has a claim against the owners of a ship personally as well as against the ship he may ordinarily enforce it by uniting the two and bring his libel in personam and in rem. But that has not been done in the pending suits. The
[fol. 490] libels allege that there was placed on board the steamship at Cadiz "in good order and condition" certain merchandise to be delivered to the libelants at the port of New York "in like good order and condition as when shipped." They allege that when the goods were discharged in New York they were not in like good order and condition as when shipped but badly damaged.

Now it is evident from what has been already stated that this court is abundantly satisfied that the goods when they were put on board the Panay were not in good order and condition but were in very bad order and condition because they were packed in insufficient containers. It is also clear that when the merchandise arrived in New York it was badly damaged but that the damage was not due to faulty stowage or negligent handling by the ship. It also appears that the bills of lading were not signed by any officer of the Panay but bore the signature of the captain of the Mogador. And that the merchandise at the time it was placed on the Mogador

was in casks which were seen to be so old, weak and defective that those in charge at Seville objected to accepting them and the shippers, thereupon, offered letters of guarantee to take the place of any notations on the bills of lading, a practice which appears to be quite common in Spain. Under these circumstances we do not see how the libel can be maintained against the Panay.

If for the sake of the argument it be assumed that the bills of [fol. 491] lading signed by the captain of the Mogador were binding upon the Panay although its officers never signed or saw them, the latter vessel could not be condemned in our opinion on the facts as they are disclosed in the record.

The general rule is that where a loss arises from an expected peril the ship is prima facie excused and can only be held liable upon affirmative proof that some negligence on the ship's part was the efficient cause of the loss. Clark v. Barnwell, 12 How. 272. In such cases the ship is discharged unless convicted of negligence by a preponderance of proof. As was said in The Lennox, 90 Fed. 308, if the cause of the injury is left in doubt, the ship stands excused for the reason that by virtue of the exceptions in the bill of lading the shipper in effect contracts that he will himself stand the risk of any loss arising from the cause named.

In Konigin Luise, 173 Fed. 811, suit was brought to recover for the leaked out portion of a consignment of 200 barrels of olive oil shipped from Smyrna to New York. The bill of lading, unlike those in the instant cases, contained an acknowledgement of receipt of the goods in good order and condition externally. The carrier interposed the defence of the insufficiency of the package. The libelant also raised the question of estoppel, claiming to be a purchaser for value of a clean bill of lading. The evidence showed that a large number of the barrels were found empty at New York, many of them having broken heads, loosened and missing hoops. [fol. 492] The District Judge entered a decree in favor of libelant. The case was brought on appeal into this court where it was reversed. There was no proof of bad stowage or mishandling. This court held the carrier exempt because the loss was due to breakage. 185 Fed. 478. In that case this court applied the rule laid down in the Lennox, supra, that where a loss arises from one of the excepted perils she can only be held liable upon affirmative proof that some negligence on her part was the efficient cause of the loss. We held the ship was prima facie not liable and that proof of the ship's negligence was insufficient to preclude it from relying on the exception.

In The Koranna, 214 Fed. 172, the libelants sued for damage to a consignment of cocoanut oil pipes which were brought to the Port of New York from Colombo, Ceylon. On their arrival in New York, 13 of the casks were nearly empty, 18 were in bad condition, and the rest contained only about one-half of their original contents. The libel was dismissed as the court did not think that it had been proven by a fair preponderance of the evidence that the damage

was occasioned by the negligence of the vessel. The bill of lading provided that the carrier should not be liable for drainage, leakage, breakage, contact with other goods, or for insufficient packing. The court declared that whenever damages attributable to causes excepted in the bill of lading are sustained the burden is on the libelant to show that the loss occurred through the negligence of the carrying vessel.

[fol. 493] In E. Tolibia & Co., Inc., v. SS. Orion, decided at this term and not yet reported, the shipment consisted of barrels of olives and olive oil. The bills of lading like these in the instant cases acknowledged receipt of the packages without any reference to their order and condition one way or the other. The voyage began at Seville, Spain, and ended at the City of New York. The oil leaked so badly from these barrels after they were placed on board the vessel that the ship was obliged to pump large quantities of oil from the bilges before leaving port. It was claimed that improper stowage brought about the damage. The court below held that the barrels were insufficient containers and dismissed the libels. This court affirmed the court below and held that the libelant had failed to meet the burden assumed by it to prove that there was improper stowage which caused the loss.

In the instant cases the damage to the merchandise came within the exceptions of the bill of lading which declared that the shipowners were not responsible for breakage. That many of the casks were broken is undisputed. The burden of proof rested upon the libelants to establish negligence on the part of the claimant and this burden we have no hesitation in saying was not sustained. On the contrary it has been established by the overwhelming weight of evidence that whatever damage the merchandise suffered in the cases now before the court was due not to the negligence of the ship but to the old and insufficient containers in which the goods were shipped.

[fol. 494] In 2 Williston on Contracts 2025 it is said: "A bill of lading is always a receipt * * *; like other receipts it is only prima facie evidence of the acknowledgments contained in it unless the parties by its express terms make it conclusive, as they may do. * * * It is also a contract, or evidence of a contract." In what respects it is a contract it is not now necessary for us to consider. Lord Bramwell, a judge of very high authority, said in Sewall v. Burdick, 10 A. C. 74, 105, that to his mind "there is no contract in it." But assuming as we do that in this he was mistaken, we nevertheless are not in these cases concerned with the contractual parts of the bills of lading.

The primary purpose of a bill of lading is to express the terms of the contract between the shipper and the carrier as to the transportation and delivery of the goods. But it has a two-fold character and it is also an acknowledgment of receipt of the goods shipped. As a receipt it may be contradicted by parol evidence. In the Delaware, 14 Wall. 579, 601, the court speaking through Mr. Justice Clifford said:

"Text writers mention the bill of lading as an example of an instrument which partakes of a two-fold character, and such commentators agree that the instrument may, as between the carrier and the shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their [fol. 495] internal state and condition was bad or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites, but in all other respects it is to be treated like other written contracts."

In 4 Am. & Eng. Ency. of Law 526 it is said:

"The general rule is that a bill of lading in so far as it admits the receipt of goods by the carrier and states the character, quality, quantity, or condition of the goods when they were received, is a mere receipt, and may be explained and contradicted by parol evidence."

But in the instant cases the bills of lading do not need to be contradicted as they are silent as to the condition of the merchandise when it was received.

The bills of lading which were issued in these cases were what are known as "clean" bills. A clean bill of lading is one which contains nothing in the margin qualifying the words in the bill of lading itself. 61 Law Times 330. Bouvier's Law Dictionary. A witness at the trial was asked what was meant by a clean bill of lading, and he replied:

"A clean bill of lading is a bill of lading that a banker will accept and attach to a draft and on which he will make payment against a [fol. 496] letter of credit, and which indicates that the merchandise was in good condition when it was received from the steamship company."

The libelants paid for the olives on the strength of the bills of lading. One of the libelants in the first action testified as follows:

"Q. On the strength of this bill of lading did you accept the shipment?

A. Yes.

Q. Did you pay the shipper for the goods?

A. The money was placed in Seville at the time we made our purchase, and it was made available for his drafts in connection with a clean bill of lading.

Q. You paid the money in advance on which he could draw for a clean bill of lading?

A. Yes; in other words a letter of credit was opened.

Q. Under your arrangement would he have been able to draw on a bill of lading which was not clean?

A. He would not."

And one of the libelants in the second action after stating that he was presented with a clean bill of lading and thereupon accepted the draft in payment was asked: "Have you in the course of your business ever accepted any bill of lading for consignments of olives containing notations as to insufficient containers?" and he answered "No."

The bills of lading in the instant cases were straight bills of [fol. 497] lading. The Act of August 29, 1916, known as the Bills of Lading Act, declares "That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill." 39 S-at. L. p. 539, sec. 2. And the Act makes straight bills non-negotiable and order bills negotiable. Section 29 of the Act provides that a straight bill cannot be negotiated free from existing equities. Where the shipper names another as consignee the title to the goods is in the person so named. George F. Hinrichs, Inc. v. Standard Trust & Savings Bank, 279 Fed. 382, 386. If the consignee in a straight bill pays the consignor for the goods before he receives them, or directs his banker to pay for him on the presentation of a clean bill of lading he pays at his own risk. If the goods reach him in damaged condition he cannot hold the ship liable unless he can show that the damaged condition of the merchandise was occasioned by the ship's default. In the instant cases no such default on the part of the ship is shown.

The master of the Panay testifying as to what he would have done at Seville if the bill of lading had been presented to him as Captain of the Mogador said that if the goods were delivered to him in bad condition he might reject them, or accept them making his notation on the bill of lading concerning their condition, but that he would not make such notations where he was given letters of guarantee responding for his or the ship's responsibility for the freight. His testimony was:

"If a letter of guarantee is given me relieving me or the ship of [fol. 498] all responsibility, as was done in this case, no notation will be put on the bill of lading, but if there is no letter of guarantee given, then a notation will be put on the bill of lading."

He was asked why letters of guarantee were given in Seville and replied:

"If the bills of lading are issued with a note on them the insurance companies or the bankers in Spain will not accept that bill of lading on account of the condition in which the goods are, but if they have no clause on it they will pass it to a banking house and the insurance company that they have been shipped by the shipper in apparent good order and condition, although they have issued a letter of guarantee relieving the company of any responsibility whatsoever for the condition of the packages."

He was then shown three letters and asked what they were and replied:

"They are letters of guarantee, relieving the company of all responsibility for the conditions in which the packages are received at destination."

These letters appear to be signed by the shippers in each of these actions. That in the first of the three suits is alone incorporated herein. It reads as follows:

"With reference to the shipment of 227 casks of olives that we are [fol. 499] making by the steamer 'Isla de Panay' to New York, we understand that the Company considers the containers insufficient and that it does not accept responsibility for the damages that they suffer as natural consequences of the voyage.

And as guarantee of that Company, we sign the present, as you have delivered us clean bills of lading."

The notations are not made on the bills of lading because the shippers are opposed to the practice and prefer to give a guarantee. This opposition of the shippers to having notations made on the bills of lading is due to their belief that it unnecessarily prejudices their goods and "leaves everything to the good faith of the receivers."

These letters of guarantee were not addressed to the Panay or to its Captain or Master, but to the Campania Transatlantica, Seville, and were dated November 5, 1917, which was the day on which the Panay sailed from Cadiz. As neither the Captain or any other officer of the Panay ever had anything to do with these letters or even saw them until they saw them in New York at or about the time of the trial we confess inability to see how the letters impose upon the ship a liability which otherwise does not exist. So far as they could have any effect they were intended to protect from liability, not to impose it.

It is said that the ship is estopped from showing the facts as to the condition of the shipment when it was received. The Harter [fol. 500] Act, Act of February 13, 1893, c. 105, Sec. 4, makes it the duty of the shipowner, master or agent of the vessel to issue to shippers of merchandise a bill of lading stating among other things the apparent order or condition of the merchandise received for transportation. That this section applies to a foreign vessel on a voyage from a foreign port to a port in the United States was decided in Knott v. Botamy Mills, 179 U. S. 69, 74. It was urged upon us at the argument that the Harter Act made it the duty of the shipowner or the master to speak by the bill of lading as to the condition of the goods, and that the failure to speak operates as an estoppel. It is quite true that an estoppel may arise from silence as well as from words, and that silence under some circumstances may amount to a misrepresentation. When the silence is of such a character and under such circumstances that it would become a fraud upon the other party to permit the party who has kept silent to deny that his silence has induced the other to believe and act upon it the silence will operate as an estoppel. If a man is silent

when it is his duty to speak he shall not be permitted to speak when it is his duty to be silent. Niven v. Belknap, 2 Johns 575. But if prior to the Harter Act a bill of lading made no representation as to the condition of the goods the silence of the bill worked no estoppel on the shipowner to deny that the goods were in proper containers. And since the Harter Act if the bill of lading contains no representation on the subject the omission may subject one to the penalty imposed by the Act which declares that for a [fol. 501] violation of any of its provisions the agent, owner, or master of the vessel guilty of such violation, "and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding $2,000." That is the only penalty the Act prescribes. Whether the shipowner would have been estopped if the Master of the Panay had signed the bills of lading is a question not before us because we have seen that the goods shipped were delivered in the first instance to the Mogador at Seville, that the bills of lading were issued there and not at Cadiz and that the Master of the Panay never saw or had anything whatever to do with them. The only papers he received were the shipping orders and on them the notations were entered stating the condition of the cargo of olives when he received them. On this state of facts the Panay is not estopped from showing the true condition of the shipment when received on board at Cadiz.

The libelants also rely upon the case of Higgins v. Anglo-Algerian SS. Co., 248 Fed. 386, which this court decided in 1918. In that case the steamer received 3,000 cases of dates at Busreh to be carried to New York. A clean bill of lading was issued for the same, which recited that the dates were apparently in good order and condition. On their arrival in New York 2,085 of the cases were found to be damaged by water. In that case the court said:

"Further the respondent had the courage to set up as a defense its own complicity in a fraud, viz., that a large number of the [fol. 502] cases which had been wet and were stained and discolored by rain were received from lighters; that their stained, damaged, and discolored condition had been noted on the mate's receipts, but that a clean bill of lading was delivered to the shippers at their request, against their agreement to indemnify the respondent against loss for so doing. This was pleaded as an admission binding on the holder of the bill of lading that the cases were not shipped in apparent good order and condition, and a bar to the maintenance of the libel. * * *

Though courts of admiralty are not courts of equity, and may not be able to give affirmative relief in the case of contracts induced by preliminary fraudulent representations (Williams v. Insurance Co., D. C. 56 Fed. 159), still they do proceed upon equitable principles and may prevent a party from taking advantage of his own fraud in the contract itself. Pew V. Laughlin (D. C.) 3 Fed. 39; The Hero (D. C.) 6 Fed. 526, and The Electron (D. C.) 48 Fed. 689, are examples. To give the carrier the benefit of this

exception would be to enable it to protect itself against the consequences of its own fraud."

In The Higgins case the bills of lading recited that the shipments had been received in good condition. In the instant cases the bills of lading contain no representation as to their condition one way or the other, and the distinction is vital.

Decrees affirmed.

[fol. 503] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 2ND CIRCUIT

[Title omitted]

ORDER FOR MANDATE—Filed July 27, 1923

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

[fol. 504] On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R. C. M. H.

[File endorsement omitted.]

[fol. 505] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 2ND CIRCUIT

[Title omitted]

ORDER FOR MANDATE—Filed July 27, 1923

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from [fol. 506] the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court he and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R. C. M. H.

[File endorsement omitted.]

[fol. 507] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 2ND CIRCUIT

[Title omitted]

ORDER FOR MANDATE—Filed July 27, 1923

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

[fol. 508] On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R. C. M. H.

[File endorsement omitted.]

[fol. 509] UNITED STATES OF AMERICA,
Southern District of New York, ss:

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 508 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Austin Nichols & Company, Libellant-Appellant, against Steamship Isla De Panay, her engineers, etc., Compania Trasatlantica, Claimant-Appellee (and 2 other cases), as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 5th day of October in the year of our Lord One Thousand Nine Hundred and Twenty Three and of the Independence of the said United States the One Hundred and Forty Eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 510] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

Nos. 609, 610 and 611

[Title omitted]

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

ORDER GRANTING PETITION FOR WRITS OF CERTIORARI—Filed November 12, 1923

On consideration of the petition for writs of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writs.

November 12, 1923.

[File endorsement omitted.]

SUBJECT INDEX.

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If the *Isla de Panay's* agent were entirely innocent of misrepresentation or fraud, the *Isla de Panay* should nevertheless be held liable under the rule that where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong 20

II.—The decision of the Circuit Court of Appeals, *sua sponte,* without suggestion of any counsel, that the *Isla de Panay* was not liable *in rem,* is in direct conflict with the decision of this Court in *Bulkley* v. *Naumkeag Steam Cotton Company,* 24 Howard, 386, which was not mentioned in the opinion of the Circuit Court of Appeals 22

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1923.

No. ———

AUSTIN NICHOLS & COMPANY, EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners trading as E. Sanchez & Company, and E. TOLBIA & COMPANY,

Petitioners,

—against—

Steamship ISLA DE PANAY; COMPANIA TRASATLANTICA,

Claimant-Respondent.

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of AUSTIN NICHOLS & COMPANY, EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners trading as E. Sanchez & Company, and E. TOLBIA & COMPANY, respectfully shows unto this Court as follows:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit on the ground that the questions involved are of great public and commercial importance and have been decided contrary to decisions of this Court and of the Circuit Courts of Appeals of other Circuits.

The petitioners, as consignees, sued the steamship *Isla de Panay* on bills of lading issued in her name as a common carrier for delivering the goods in a damaged condition. The goods consisted of casks of olives packed in brine shipped from Seville, Spain, to New York. The bills of lading were in the form universally issued by the Spanish and Dutch steamship lines for shipment from Spanish and Dutch ports to the United States and also for shipments between any ports in the world on Spanish and Dutch vessels. In these trades the words "in apparent good order and condition" are omitted from the printed form, but, as both Courts below have found, there is an established trade usage that such bills of lading are "clean" and represent that the goods are fit for shipment and carriage unless the vessel's agent makes the bills of lading "foul" by noting on them that the goods when received on board were unfit for carriage. No such notation was made on the bills of lading in this case. It was admitted by the claimant, and both Courts below have found, that at the time he issued the bills of lading, the *Isla de Panay's* agent knew not only that the goods were unfit for carriage, but also that the shippers, on delivering the bills of lading to the consignee's agents, would in the ordinary course of business represent that the goods were actually fit for carriage. Indeed, it is also shown without dispute that the *Isla de Panay's* agent when issuing the bills of lading knew that the issuance of them in a grammatically ambiguous form was necessary to enable the shippers successfully to deceive the consignee's agents into believing that the goods covered by the bills of lading were fit for carriage when shipped. The Captain of the *Isla de Panay* testified (Record, p. 263):

> "If the bills of lading are issued with a note on them the insurance companies or the bankers

in Spain will not accept that bill of lading on account of the condition in which the goods are, but if they have no clause on it they will pass it to a banking house and the insurance company that they have been shipped by the shipper in apparent good order and condition, although they have issued a letter of guarantee relieving the company of any responsibility whatsoever for the condition of the packages."

The *Isla de Panay's* agent, knowing that the goods when offered for shipment were in obviously unfit condition for carriage, declined to issue other than "foul" bills of lading unless the shippers would give a written guaranty holding the *Isla de Panay* harmless from any claim for damages to the goods. The shippers gave such written guaranty in the following form (Record, p. 450):

"Rowlett & Pyman.

Seville, November 5, 1917.

Robert Harnden,
Consul of the U. S. of America.

Compania Trasatlantica,
Sevilla.

My dear Sirs:

With reference to the shipment of 227 casks of olives that we are making by the steamer *Isla de Panay* to New York, we understand that that Company considers the containers insufficient and that it does not accept responsibility for the damages that they suffer as natural consequences of the voyage.

And as guarantee of that Company, we sign the present, as you have delivered us clean bills of lading.

Yours very truly,

ROWLETT & PYMAN."

The *Isla de Panay's* agent then issued the bills of lading here sued on without noting on them that the goods were unfit for carriage or that the written letter of indemnity had been exacted. Both Courts below have found that there was nothing on the face of any of the bills of lading from which an innocent buyer might infer that there was anything wrong with the goods when shipped. It is uncontradicted that the *Isla de Panay's* agent, when he issued the bills of lading, knew that such bills of lading with drafts attached would be presented to the consignees in the ordinary course of business before the consignees would have an opportunity to examine the goods, and while they were in the exclusive possession of the *Isla de Panay.* A photographic copy of one of the bills of lading, which were all in exactly the same form, is shown on page 435 of the Transcript of Record. It recites that the goods were shipped on board the steamship *Isla de Panay.* It is signed by "El Capitan, A. Pastrana". There is nothing on the face of the bill of lading to indicate to an innocent buyer that A. Pastrana was not the Captain of the *Isla de Panay* or that at the time the bills of lading were issued the goods were not actually on board the *Isla de Panay.* The claimant of the *Isla de Fanay* set up as a defense, which the lower courts have sustained, that the goods were unfit for carriage when shipped. The petitioners contended that the claimant was estopped, by its conspiring with the shippers to deceive the admittedly innocent consignees, from denying the libellants' allegation that the goods were shipped in good condition. The

petitioners argued that a ship acting as a common carrier could not as against an innocent purchaser of merchandise represented by such ambiguous or clean bills of lading receive goods for carriage which she knew to be unfit for carriage and later when such innocent purchaser sued the ship deny that the goods were in proper condition for carriage, when the ship's agent knew that the purpose of issuing the clean bills of lading was to deceive such purchaser as to their condition when received by the ship for carriage. The petitioners contended further that in view of the written guaranty of indemnity exacted by the *Isla de Panay* from the shippers in this case she should be precluded from setting it up as a defense to a claim by admittedly innocent purchasers who were given no notice by the *Isla de Panay* that clean bills of lading had been given by the ship only because the shippers had given secret guarantees to the ship.

The District Court and the Circuit Court of Appeals, however, while expressly finding all the facts above set forth, have decided that there can be no estoppel because there was no express representation in the bills of lading that the goods were in good condition and fit for carriage. In the case of *Anglo-Algerian Steamship Company* v. *Higgins*, 248 Fed. 386, there was such express representation in the bills of lading, and the courts in the present case have held that that decision defines the limit of the estoppel principle. Both Courts below have expressly found that all the bills of lading involved here were "clean" (Record, pp. 454, 495). Both Courts below have also found that there was an intentional concealment by the *Isla de Panay's* agent when issuing the bills of lading of the material fact that the goods were unfit for carriage and that this concealment was for the purpose of inducing the innocent consignees, before having an opportunity to examine the goods, to purchase

the merchandise in the ordinary course of business on the assumption that the goods were fit for carriage. They have also found that the consignees were in fact innocent and were deceived and prejudiced. We rest our petition on these admitted and found facts. They bring this case squarely within the well established principle announced by decisions of this Court and of the Circuit Courts of Appeals of other Circuits that to constitute an estoppel it is not necessary that there be an express representation; that it is only necessary that there be a concealment of a material fact by a person who is under a duty to disclose it, resulting in prejudice to an innocent third person. The *Isla de Panay's* agent was under a duty to disclose in the bills of lading the fact that the goods were unfit for carriage because he knew that the innocent consignees would receive the bills of lading in the ordinary course of business for purchase before the arrival of the goods would afford them an opportunity to ascertain their actual bad condition.

The Circuit Court of Appeals also said in its opinion, of its own motion without suggestion by any counsel in the case, either in argument or briefs, that the bills of lading here involved were not issued by the *Isla de Panay* but by the "Captain of the Mogador". But that part of the Court's decision is directly contrary to the decision of this Court in *Bulkley* v. *Naumkeag Steam Cotton Company*, 24 Howard (U. S.) 386, which is not mentioned in that Court's opinion. Moreover, it is a conclusive answer to the Circuit Court of Appeals's suggestion merely to call this Court's attention to the photographic copy of one of the bills of lading in this case (all of which are admittedly exactly in the same form) shown on page 435 of the Transcript of Record. The bill of lading shows on its face that the goods were received "on board the Spanish steamship *Isla de Panay*", and the bill of lading is signed "El Capitan, A.

Pastrana". There is nothing in the bill of lading to indicate to an innocent buyer that Pastrana was not the captain of the *Isla de Panay*. The claimant set up in defense that Pastrana was not the captain of the *Isla de Panay*. The captain of the *Isla de Panay*, A. Muslera, however, during the course of his testimony, expressly admitted that Pastrana was fully authorized to sign bills of lading in the name of the *Isla de Panay* immediately on receipt of the goods on board his river lighter, the *Mogador*, from piers at Seville for lighterage to the *Isla de Panay*, the ocean-going vessel, which, because of her great draft, was unable to go alongside the piers. This testimony was entirely overlooked by the Circuit Court of Appeals when passing on its own suggestion. Captain Muslera said (Record, p. 238):

> "Q. The shipment of olives in this case was received by the Spanish Line as owners of the *Isla de Panay* at Seville; is that correct? A. Yes, sir.
>
> Q. Through the agency of the captain of the *Mogador?* A. Yes, sir.
>
> Q. And when the captain of the *Mogador* received a cargo at Seville for through shipment by the Spanish Line as owners of the *Isla de Panay* to New York he signed naturally the bills of lading? A. Yes, sir.
>
> Q. And that is what happened in this case? A. Yes. But sometimes they give letters of guarantee.
>
> Q. But in this case he did receive the cargo for the Spanish Line at Seville? A. Yes, sir.
>
> Q. And he turned it over to the *Isla de Panay* through lighters owned by the Spanish Line at Cadiz? A. Yes, sir."

Furthermore, the *Isla de Panay's* agent at Seville expressly admitted that bills of lading would in the ordi-

nary course of business have been signed in the name of the *Isla de Panay* by the actual captain of the *Isla de Panay,* but that in the present case "due to the latter's absence", Pastrana, who was fully authorized to sign as agent for the actual captain of the *Isla de Panay,* signed the bills as "El Capitan, A. Pastrana" (Record, p. 418).

Petitioners respectfully submit that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons, among others:

First: Because the Circuit Court of Appeals for the Second Circuit was in error in holding that, although the ship's agent issued bills of lading which were "clean", and which he knew would be used by the shippers in the ordinary course of trade for sale purposes as a receipt by the ship of the goods in apparent good order and condition, he was not estopped from setting up his own fraud in a suit on these clean bills of lading by innocent, defrauded consignees.

Second: Because the Circuit Court of Appeals erroneously held that the steamship *Isla de Panay* was not bound *in rem.*

Third: Because the Circuit Court of Appeals' decision on the point last referred to is in direct conflict with the decision of this Court in *Bulkley* v. *Naumkeag Steam Cotton Company,* 24 Howard 386.

Fourth: Because the decision undermines the sanctity of bills of lading and commercial documents generally and gives ship's agents sanction and encouragement to assist in frauds whereby innocent importers are deprived of any security in dealings involving the importation of merchandise from Spain, Holland and other countries where similar forms of bills of lading are in common use.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of said Circuit Court of Appeals in this case, which was entitled in that Court: Austin Nichols & Company, Libellant-Appellant, against The steamship *Isla de Panay*, her engines, etc., Compania Trasatlantica, Claimant-Appellee; Eug. Sanchez and Jose Gilde Sagredo, co-partners, trading as E. Sanchez & Company, Libellants-Appellants, against the same; E. Tolbia & Company, Libellant-Appellant, against the same (Consolidated Causes), to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioners may have such other and further relief in the premises as to this Court may seem just, and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

Dated, October 8, 1923.

AUSTIN NICHOLS & COMPANY,
EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners, trading as E. Sanchez & Company,

E. TOLBIA & COMPANY,

Petitioners.

By GEORGE E. HARGRAVE,
Attorney.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

United States of America,
Southern District of New York—ss.:

GEORGE E. HARGRAVE, being duly sworn, deposes and says:

He is the attorney for the petitioners herein, and has knowledge of this litigation. The foregoing petition and the matters therein set forth are true to best of his knowledge, information and belief.

GEORGE E. HARGRAVE.

Sworn to before me this
8th day of October, 1923.

EDWARD A. QUINLAN,
Notary Public.

(Seal)

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1923.

Consolidated Causes.

AUSTIN NICHOLS & COMPANY, EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners trading as E. Sanchez & Company, and E. TOLBIA & COMPANY,

Petitioners,

—against—

Steamship "ISLA DE PANAY"; COMPANIA TRASATLANTICA,

Claimant-Respondent.

BRIEF IN SUPPORT OF PETITION.

POINT I.

The decision of the lower courts that although the petitioners were defrauded there can be no estoppel unless there is an express representation by a recital in the bill of lading, is directly contrary to the decisions of this Court and of the Circuit Courts of Appeals of other circuits that an estoppel need consist only of a concealment of a material fact by a person under a duty to disclose it, resulting in prejudice to the person from whom the information has been withheld.

The lower Courts have found, and indeed opposing counsel do not dispute, that the *Isla de Panay's* agent in this case deliberately omitted from the bills of lading the known fact that the goods were in bad condition

when shipped, for the express purpose of concealing from the libellants the actual condition of the goods, so that on receipt of the bills of lading, before having an opportunity to examine the goods, they would pay their sound value.

The District Court said:

> "Libellants are consignees of shipments of olives under clean bills of lading. * * * I think the great weight of evidence is to the effect that the chestnut casks containing the olives were old and insufficient at the time the merchandise left Seville for transshipment to claimant's vessel at Cadiz. The steamship agents distrusted the containers and insisted upon an agreement of indemnity as a condition of carrying the merchandise under clean bills of lading, which seems to have been given at Seville. * * * The libellants paid drafts accompanying the bills of lading without knowledge that the containers were old and insufficient. If there is any liability here for damages, it is upon the theory that by failing to note in the bills of lading any insufficiency in the containers, the steamship misled the libellants to their injury and is now estopped, under the doctrine of *Higgins* v. *Anglo-Algerian Steamship Company,* 248 Fed. 386, to claim that the containers were insufficient. In that case, however, there was in the bill of lading the express representation that the merchandise itself was in apparent good order and condition. * * * No case has gone so far as to hold that a bill of lading containing no words representing the condition of the containers would give rise to an estoppel" (Record, pp. 454-456).

The Circuit Court of Appeals affirmed this decision.

This Court has held several times that a concealment of a material fact by a person under a duty to disclose it, resulting in prejudice to the deceived person, is

sufficient to constitute an estoppel. In *Morgan* v. *Railroad Company*, 96 U. S. 716, 720, this Court said:

> "The appellee insists that the record discloses a case of estoppel *in pais*, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. *The Bank of the United States* v. *Lee*, 13 Pet. 107.
>
> He is not permitted to deny a state of things which by his culpable silence or misrepresentation he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. *Merchants' Bank* v. *State Bank*, 10 Wall. 604."

In the present case, putting the facts far more favorably for the ship than they allow, the *Isla de Panay's* agent was silent regarding the unfit condition of the goods when he issued the bills of lading. Therefore he is estopped to deny the allegation of the libel that the goods were shipped in good condition. He ought in good faith to have spoken at that time to inform innocent consignees, who would, as he knew, pay cash for the goods on faith of the bills of lading before having an opportunity to examine the goods.

In *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, 108-109, this Court said:

> "The doctrine of estoppel by conduct has been applied under a great diversity of circumstances.

In the consideration of the question before us aid will be derived from an examination of some of the cases in which it has been defined and applied. In *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720, it was held that a party may not deny a state of things which by his culpable silence or misrepresentations he has led another to believe existed, if the latter has acted upon that belief. 'The doctrine,' the court said, 'always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.' In *Continental Bank* v. *Bank of the Commonwealth*, 50 N. Y. 575, 583, it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. 'Indeed,' said Folger, J., 'it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped, but it has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. *Gaylord* v. *Van Loan*, 15 Wend. 308.' The general doctrine, with proper limitations, was well expressed in *Freeman* v. *Cooke*, 2 Exch. 654, 663, and in *Carr* v. *London & Northwestern Railway Co.*, L. R., 10 C. P. 307. In the first of those cases it was said by Parke, B., for the whole court, that 'if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may

> often have the same effect.' And in the other case, Brett, J., speaking for the court, said: 'IF IN THE TRANSACTION ITSELF WHICH IS IN DISPUTE, ONE HAS LED ANOTHER INTO THE BELIEF OF A CERTAIN STATE OF FACTS BY CONDUCT OF CULPABLE NEGLIGENCE CALCULATED TO HAVE THAT RESULT, AND SUCH CULPABLE NEGLIGENCE HAS BEEN THE PROXIMATE CAUSE OF LEADING AND HAS LED THE OTHER TO ACT BY MISTAKE UPON SUCH BELIEF, TO HIS PREJUDICE, THE SECOND CANNOT BE HEARD AFTERWARDS, AS AGAINST THE FIRST, TO SHOW THAT THE STATE OF FACTS REFERRED TO DID NOT EXIST.' See also *Manufacturers' & Traders' Bank* v. *Hazard*, 30 N. Y. 226, 229; *Blair* v. *Wait*, 69 N. Y. 113, 116; *McKenzie* v. *British Linen Co.*, 6 App. Cas. 82, 101; *Miles* v. *McIlwraith*, 8 App. Cas. 120, 133; *Cornish* v. *Abington*, 4 H. & N. 549, 556.
>
> Upon this doctrine, substantially, rests the decision in *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333, 343." (Capitalization our own.)

In the present case, however, there was not merely negligence of the *Isla de Panay's* agent, but deliberate and intentional concealment.

In *Dickerson* v. *Colgrove*, 100 U. S., 578, 580, this Court said:

> "The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice."

In *The United States Bank* v. *Lee,* 13 Peters (38 U. S.), 107, the syllabus says:

> "If the true owner stands by and does not make his title known, he will be bound to make good the contract, on the principle that he who holds his peace when he ought to have spoken shall not be heard now that he should be silent; he is deemed, in equity, a party to the fraud."

Here the *Isle de Panay's* agent did not merely stand by when the bills of lading were issued, but conspired with the shippers to defraud purchasers of the goods shipped. He declined to issue clean bills of lading until the shippers would indemnify him against the certain litigation with the defrauded consignees. The clean bills of lading were signed by such agent because he would "not accept responsibility for the damages that they (the goods) suffer as natural consequences of the voyage" (Record, p. 450).

The decisions of the Courts below are also contrary to the decisions of Circuit Courts of Appeal of other Circuits.

In *H. Scherer & Co.* v. *Everest,* 168 Federal, 822, 829, the Circuit Court of Appeals for the Eighth Circuit said:

> "If so, the purchaser of the notes who took them up in good faith in reliance upon their apparent validity and upon the Decatur Company's apparent ownership of them must suffer for this fraud, while the Transfer Company which made the notes, which knew they were without consideration, which created their false appearance of validity and the false appearance of their ownership by the Decatur Company, escapes the evil consequences of its participation in the fraud. This would be a reversal of the familiar and

salutary rule that one who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. *Paxson* v. *Brown,* 61 Fed. 874, 882, 10 C. C. A. 135, 143; *Union Pacific Ry. Co.* v. *United States,* 67 Fed. 975, 979, 15 C. C. A. 123, 127; *Illinois Trust & Savings Bank* v. *City of Arkansas City,* 76 Fed. 271, 293, 22 C. C. A. 171, 192, 34 L. R. A. 518; *Given* v. *Times Republican Printing Co.,* 114 Fed. 92, 95, 52 C. C. A. 40, 43; Mechem on Agency, Sections 83, 84."

In *The Tampico,* 270 Federal, 537, 540, 541, the Circuit Court of Appeals for the Ninth Circuit said:

"These communications from the appellee answered the appellant's inquiry as to the term of the original charter party. The appellant had asked for a copy of that charter, for the purpose of ascertaining the length of time for which the owner had parted with the right of possession. The letters conveyed that information fully and completely. The appellant had the right to rely on the information so furnished. It had the right to believe that there was no provision in that charter party by which th[illegible]rm thereof could be abbreviated at the option of the owner. The representation was made with the intention that it should be acted upon. It was a representation such as to induce a reasonable and prudent man to believe that it was intended to be acted upon, and the appellant in acting upon it exercised such reasonable diligence as the circumstances required. The situation is the same as it would have been, had the appellee sent the appellant a copy of that charter party, with the optional provision in favor of the owner inadvertently omitted therefrom. * * *

> It is contended that there can be no estoppel in cases where, as here, the representations were made without fraudulent intent. But the rule is well established that it is not necessary that the representations shall have been made with such an intent. It is sufficient if they are 'of such a character as to induce a reasonable and prudent man to believe that they were intended to be acted on.' 21 C. J. 1121; 10 R. C. L. 691."

There, as in this case, there was a mere concealment without express representation.

The elements of an estoppel *in pais* are stated by Pitney, J., in *Central Railroad Company* v. *MacCartney*, 68 N. J. L. (39 Vroom), 165, 175, 176, as follows:

> "1. That the party against whom the estoppel is urged has, on a previous occasion, by words or conduct, made a representation or concealment of material facts inconsistent with the facts forming the basis of his present claim.
>
> 2. That such party either knew the facts to be otherwise than represented, or except for gross negligence would have known; or that he pretended to know the facts when he knew that he did not know them.
>
> 3. That such representation or concealment was made with the intent to influence the conduct of another or else was made under such circumstances that a reasonably prudent man would suppose it was intended to be acted upon as true.
>
> 4. That the party to whom it was made was ignorant of the facts and had no convenient opportunity to ascertain them.
>
> 5. That the latter party in good faith, relied upon the representations or conduct of the other party and thereby was led into such a course of conduct that he will now be substantially prejudiced if the other party be permitted to repudiate his former action or representation."

In the present case:

(1) The *Isla de Panay's* agent admittedly concealed the material fact that at the time he issued the bills of lading the goods were unfit for carriage;

(2) He actually knew that the goods were unfit for carriage, and to protect himself obtained a written guarantee of indemnity from the shippers, without noting on the bill of lading the fact that this guarantee had been executed, and knowing that notice of the guarantee would not be given to the consignee;

(3) Such concealment was made with the intent to influence the consignee to pay the sound value of the goods represented by the bill of lading before having an opportunity to examine the goods;

(4) The consignee was ignorant of the actual condition of the goods, and had no opportunity to examine them, they being in the possession of the *Isla de Panay's* agents on the high seas; and

(5) The consignee in good faith relied upon the conduct of the *Isla de Panay's* agent in accordance with the undisputed trade usage that such bills of lading were clean, and thereby was led into paying cash for the bills of lading on the assumption that they represented sound goods.

Thus all the elements of an estoppel exist without dispute in this case. Indeed, it is so elementary that a deliberate concealment of a material fact by one under a duty to disclose it is the equivalent of an express representation in constituting an estoppel, that we need only ask this Court to read the facts as stated in the opinions of the two Courts below, and then read the definition of the elements of an estoppel contained in 21 Corpus Juris 1249.

IF THE *ISLA DE PANAY'S* AGENT WERE ENTIRELY INNOCENT OF MISREPRESENTATION OR FRAUD, THE *ISLA DE PANAY* SHOULD, NEVERTHELESS, BE HELD LIABLE UNDER THE RULE THAT, WHERE ONE OF TWO INNOCENT PARTIES MUST SUFFER, HE MUST BEAR THE LOSS WHOSE ACT PUT IT IN THE POWER OF THE THIRD PARTY TO COMMIT THE WRONG.

It is uncontroverted that the issuance of the bills of lading by the *Isla de Panay's* agent in the form in which they were issued was a necessary step in putting it in the power of the shippers to defraud the consignees.

In *Peoples Bank* v. *the National Bank*, 101 U. S., 183, this Court said:

> "Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequence."

See also

Cutler v. *United States*, 21 Wallace, 275;
Pompton v. *Cooper Union*, 101 U. S., 204.

This is an ancient doctrine. It is announced in *Hern* v. *Nichols*, 1 Salkeld 289:

> "For, seeing somebody must be the loser, it is more reasonable that he that employs and puts trust and confidence in the deceiver should be a loser rather than a stranger."

The rule is stated with pertinence by Lord Romilly, in *Briggs* v. *Jones*, Law Reports, 10 Eq. 92, 98:

> "A person who puts it in the power of another to deceive must take the consequences. He cannot afterwards rely on a particular or different equity."

In *Smith* v. *Armour Packing Company,* 158 Federal, 86, 88, the Circuit Court of Appeals for the Eighth Circuit, said:

> "The case presents an apt instance for the application of the wholesome rule that, where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong."

In *H. Scherer & Co.* v. *Everest* (*supra*), the Circuit Court of Appeals for the Eighth Circuit, said:

> "The Transfer Company intentionally and with culpable negligence made and intrusted these deceitful representations and the power to use them to its agent, the Decatur Company, and if the latter abused that power the Transfer Company and its successor in interest, the trustee, are estopped from denying that its representations were true for the purpose of defeating the claims of the holders of these notes. When one of two parties must suffer loss from the fault of a third, he who wrongfully or with culpable negligence put it in the power of the third to cause the loss must bear it."

POINT II.

The decision of the Circuit Court of Appeals, *sua sponte*, without suggestion of any counsel, that the *Isla de Panay* was not liable *in rem* is in direct conflict with the decision of this Court in *Bulkley* v. *Naumkeag Steam Cotton Company*, 24 Howard 386, which is not mentioned in the opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals in its opinion in this case said:

> "It is to be kept in mind throughout this opinion that these suits are not *in personam* against the owners of the vessel but they are *in rem* against the ship. If a libellant has a claim against the owners of a ship personally as well as against the ship he may ordinarily enforce it by uniting the two and bring his libel *in personam* and *in rem*. But that has not been done in the pending suits. The libels allege that there was placed on board the steamship at Cadiz 'in good order and condition' certain merchandise to be delivered to the libellants at the port of New York 'in like good order and condition as when shipped.' They allege that when the goods were discharged in New York they were not in like good order and condition as when shipped but badly damaged.
>
> Now it is evident from what has been already stated that this Court is abundantly satisfied that the goods when they were put on board the *Panay* were not in good order and condition but were in very bad order and condition because they were packed in insufficient containers. It is also clear that when the merchandise arrived in New York it was badly damaged but that the damage was not due to faulty stowage or negligent handling by the ship. It also appears that the bills of

> lading were not signed by any officer of the *Panay* but bore the signature of the captain of the *Mogador*. And that the merchandise at the time it was placed on the *Mogador* was in casks which were seen to be so old, weak and defective that those in charge at Seville objected to accepting them and the shippers, thereupon, offered letters of guarantee to take the place of any notations on the bills of lading, a practice which appears to be quite common in Spain. Under these circumstances we do not see how the libel can be maintained against the *Panay*."

We submit that this finding of the Circuit Court of Appeals is in direct conflict with the decision of this Court in the case of *Bulkley* v. *Naumkeag Steam Cotton Company*, 24 Howard, 386. In the *Bulkley* case, as here, the ocean vessel lay at a place at some distance from the town or place where the merchandise was tendered to the owner of the ocean vessel for shipment. In that case, as here, a usage was shown of lightering the goods from the place of shipment to the ocean vessel. There, as here, the ocean vessel, because of her deep draught, was unable to go to the place where the goods were delivered for shipment, and a steam lighter was hired to carry the goods from such place to the vessel. There, as here, a bill of lading was issued in the name of the ocean vessel. This Court held in the *Bulkley* case that delivery of the goods to the lighterman was a delivery to the master of the ocean-going vessel, and that the transportation by the lighter to the ocean-going vessel was the commencement of the voyage, for the execution of which the ocean-going vessel had engaged to carry the goods to destination. In disposing of reasons like those advanced by the Circuit Court of Appeals in support of its decision, this Court said:

> "It is insisted, however, that the vessel is exempt from responsibility upon the ground that

the one hundred bales were never laden on board of her, and we are referred to several cases in this Court and in England in support of the position. But it will be seen, on reference to these cases, the doctrine was applied, or asserted, upon a state of facts wholly different from those in the present case. In the cases where the point was ruled, the goods were not only not laden on board the vessel, but they never had been delivered to the master. There was no contract of affreightment binding between the parties, as there had been no fulfillment on the part of the shipper, namely, the delivery of the cargo. * * *

In the present case THE CARGO WAS DELIVERED IN PURSUANCE OF THE CONTRACT, THE GOODS IN THE CUSTODY OF THE MASTER, AND SUBJECT TO HIS LIEN FOR FREIGHT, AS EFFECTUALLY AS IF THEY HAD BEEN UPON THE DECK OF THE SHIP, THE CONTRACT CONFESSEDLY BINDING BOTH THE OWNER AND THE SHIPPER; and, unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it.

The argument urged against this lien of the shipper seems to go the length of maintaining, that in order to uphold it there must be a physical connection between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship, as a foundation upon which to rest this liability. The unloading of the vessel at the port of discharge, upon the wharf, or even the deposit of the goods in the warehouse, does not discharge the lien, unless the delivery is

to the consignee of the cargo, within the meaning of the bill of lading; and we do not see why the lien may not attach, when the cargo is delivered to the master for shipment before it reaches the hold of the vessel, as consistently and with as much reason as the continuance of it after separation from the vessel, and placed upon the wharf, or within the warehouse. In both instances the cargo is in the custody of the master, and in the act of conveyance in the execution of the contract of affreightment. We must look to the substance and good sense of the transaction; to the contract, as understood and intended by the parties, and as explained by its terms, and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained, in order to determine the scope and extent of them; and, in this view, we think no well-founded distinction can be made, as to the liability of the owner and vessel, between the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case as made, after the lading of the goods upon the deck of the vessel; the one a constructive, the other an actual possession; the former, the same as if the goods had been carried to the vessel by her boats, instead of the vessel going herself to the wharf." (Capitalization our own.)

This decision has been consistently followed and has been recognized as one of the leading Admiralty decisions of this Court (see Ames' Cases on Admiralty); *Insurance Company of North America* v. *North German Lloyd Insurance Company,* 106 Fed., 973; *The Pokanoket,* 161 Fed., 383; *Pearce* v. *The Thomas Newton,* 41 Fed. 106.

This Court recently had occasion, in the case of *The Saigon Maru,* 43 Supreme Court Reporter 172, to ap-

prove the decision in the *Bulkley* case on the ground that the master, through his agent, had possession of the merchandise with the power of asserting a lien.

The bills of lading in the present case show on their faces that the owners of the *Isla de Panay* acknowledge receipt of the goods on board the steamship *Isla de Panay,* and, in so far as innocent purchasers are concerned, they give the appearance of being signed by the master of the *Isla de Panay* (p. 437). It is admitted that the bills of lading were signed by the master of the lighter *Mogador* as representing the *Isla de Panay* (Record, p. 258). We submit that such bills of lading are as much the act of the master of the *Isle de Panay* as if the master of the *Isla de Panay* had personally signed them. *The City of Alexandria,* 28 Fed. 203. *The City of Alexandria* was decided by Judge Wallace, one of the best Admiralty judges of the Second Circuit. In that case, Judge Wallace held that authority to accept delivery for and to bind the vessel may be conferred by an express grant, or the conduct and relations of the parties may establish such an apparent authority that the carrier will be estopped from denying its existence to a shipper who has been misled thereby, and that, as delivery of the merchandise to the lighter was equivalent to delivery to the owners of the steamer, the steamer was liable *in rem,* notwithstanding the loss occurred before the tobacco, which was the merchandise damaged on the *City of Alexandria,* was actually laden on board of that vessel. The point was urged in that case that the master had not, in fact, personally signed the bill of lading. Judge Wallace, in disposing of this point, said:

> "Inasmuch as the master is but the agent for the owner of the vessel, this case cannot be dis-

> tinguished from the case cited (the *Bulkley* case), if the owners themselves authorized the libelants to deliver their goods to the lighters of Mendez & Co., and have treated such a delivery as a delivery to their steamer."

The owners of the *Isla de Panay* accepted the delivery of the goods on the lighter *Mogador*, which was owned by them, and treated such delivery as a delivery to the *Isla de Panay*. This fact cannot be contraverted, because the bills of lading as issued by the owners of the *Isla de Panay* admit in words the delivery to the *Isla de Panay*. To hold as the Circuit Court of Appeals holds is to permit the owners of the *Isla de Panay* to come into Court and to say that the representation made by them in the bills of lading, that the goods were delivered on board the *Isla de Panay*, is not true.

We respectfully submit that, with the exception of the decision of the Circuit Court of Appeals in this case, there is no case in this country which holds that *a ship is not liable in rem* where the goods have actually come into the possession and custody of the duly authorized agent of the ocean-going vessel and bills of lading have been issued in her name by an authorized agent.

Dated, October 8, 1923.

Respectfully submitted,

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

Sirs:

PLEASE TAKE NOTICE that a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit will be submitted to the Supreme Court of the United States at the opening of Court on the 22nd day of October, 1923, or as soon thereafter as counsel can be heard.

Dated, New York City, October 8, 1923.

Yours, etc.,

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

To:

JOHN W. CRANDALL,
HUNT, HILL & BETTS,
Counsel for Claimant-Respondent.

9

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924—NOS. 199, 200, 201.

AUSTIN NICHOLS & COMPANY, EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners trading as E. Sanchez & Company, and E. TOLIBIA & COMPANY,

Petitioners,

—against—

Steamship "ISLA DE PANAY"; COMPANIA TRASATLANTICA,

Claimant-Respondent.

BRIEF FOR PETITIONERS.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924—NOS. 199, 200, 201.

AUSTIN NICHOLS & COMPANY, EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners trading as E. Sanchez & Company, and E. TOLIBIA & COMPANY,

Petitioners,

—against—

Steamship "ISLA DE PANAY"; COMPANIA TRASATLANTICA,

Claimant-Respondent.

BRIEF FOR PETITIONERS.

Statement of the Case.

This case is here on certiorari to the United States Circuit Court of Appeals for the Second Circuit, the petition having been granted by this Court at the October 1923 Term. The Circuit Court of Appeals affirmed a decree of the District Court for the Southern District of New York dismissing three libels against the steamship *Isla de Panay*. The libels were in the usual form for cargo damage, and alleged that the goods had been shipped on the *Isla de Panay* as a common carrier at Cadiz, Spain, in good order and

condition, to be carried in like good order and condition to the libellants at New York in accordance with the terms of bills of lading issued for the shipments. The libels further alleged that when the cargo was discharged it was not in like good order and condition as when shipped, but was badly damaged. The Compania Trasatlantica filed a claim to the *Isla de Panay* as sole owner, and obtained her release by filing a bond or stipulation for value promising as principal, with a surety company as surety, to pay the amount of the libellants' claims if so decreed. The Compania Trasatlantica, as claimant and owner, then filed an answer admitting that the bills of lading constituted a contract with the *Isla de Panay* (Answer, par. 9; Record, p. 12) and setting up that the damage was due to frail containers, and that it had exempted itself from liability for frail containers by a clause in the bills of lading.

The testimony of several witnesses was taken by deposition on behalf of the claimant, and later commissions were issued to Spain by the claimant to take the testimony of witnesses residing there. These commissions were not returned until March 18th, 1922. On October 3rd, 1922, the causes came on for trial. Several witnesses were called at the trial, and, on October 23rd, the District Court filed its written opinion, which will be found at page 222 of the record. The final decree was entered on November 9th, 1922. On July 27th, 1923, the Circuit Court of Appeals filed its opinion affirming the decree of the District Court.

Statement of Facts.

The libellants, the petitioners here, purchased three lots of green olives packed in brine from exporters in Seville, Spain.

> "The money was placed in Seville at the time we made our purchase, and was made available for his drafts in connection with a clean bill of lading.
>
> Q. You sent the money in advance on which he could draw for a clean bill of lading? A. Yes, in other words, a letter of credit was opened.
>
> Q. Under your arrangement, would he have been able to draw on a bill of lading which was not clean? A. He would not" (Record, p. 26).
>
> "Q. The money was paid in advance? A. I don't know as you could say that. It was paid after the shipment had been made in exchange for documents.
>
> Q. Who has charge of the paying of the money in Spain. Did you have an agent in Spain? A. We opened our letter of credit with the correspondent of the Irving National Bank, and they paid it.
>
> Q. What is the authority in this matter besides that? A. Letter of credit recites that, in exchange for a bill of lading and other documents, he shall honor the draft of the holder, in this case, Rowlett Pyman & Company" (Record, p. 27).

The Spanish exporters, Messrs. Rowlett y Pyman and others, delivered the 354 casks containing the

three lots of olives at a wharf at Seville to the Compania Trasatlantica as owner of the *Isla de Panay* (Record, p. 144). The *Isla de Panay* was a passenger, mail and cargo steamer engaged in general service as a common carrier of goods between Spanish ports and New York (Record, pp. 103, 91 and 10). She regularly called at Cadiz at the mouth of the Guadalquivir River. Seville is 70 or 80 miles up the river from Cadiz. Seville shipments for the *Isla de Panay* are lightered down the river on the 500 cubic meter steamer *Moyador* (Record, pp. 17 and 151), also owned by the Compania Trasatlantica. The 354 casks when shipped by the sellers, although all unbroken, were frail and obviously in very bad condition and unfit for carriage (Record, pp. 157, 152, 158). Each cask was five feet long, four feet in diameter at the bilge, and weighed 750 kilos (Record, pp. 64, 156, 95). The captain of the lighter and the stevedores observed the bad condition and rejected the casks (Record, pp. 167, 152, 157, 158, 166, 172, 174, 178, 179, 190). The trade usage required notations on the bills of lading if the goods were apparently in bad condition (Opinion, C. C. A., Record, pp. 238, 239; Opinion, D. C., Record, p. 222; Record, pp. 167, 166, 174, 212, 144, 145, 146, 97). After the rejection by the captain of the lighter, the shippers induced the *Isla de Panay's* agent, Benjumea, to accept the casks for carriage and to violate the usage by issuing clean bills of lading (Record, pp. 210, 212).

The casks were loaded on the *Isla de Panay* at Cadiz "day and night" on November 4th and 5th, 1917 (Record, p. 81). She sailed from Cadiz with

the casks on board at 5 P. M. on November 5th (Record, pp. 81, 98). The bills of lading, although dated October 27, 1917, were not issued or delivered to the shippers until November 5th and 8th, 1917, after guarantees executed by the shippers on November 5th and 8th had been delivered and after the casks had been loaded on the *Isla de Panay* (Record, pp. 214, 212, 213, 152, 153, 220, 221). The bills of lading stated that the casks had been "shipped on board the Spanish steamer *Isla de Panay*" (Record, p. 215, photostat of Bill of Lading). The printed clauses of the bills of lading (all of which were in Spanish; see photostat of Bill of Lading, Record, p. 215) did not recite that the goods were shipped in apparent good order and condition. The bills of lading, as issued, however, contained no notation that the condition of any of the casks was bad or was such as to render them unfit for carriage (Record, p. 215). Such bills of lading are by trade usage regarded as "clean" (Opinion, C. C. A., Record, p. 238; Opinion, D. C., Record, p. 222). A "clean" bill of lading "indicates that the merchandise was in good condition when it was received from [by] the steamship company" (Opinion, C. C. A., Record, p. 238; Record, p. 25). The captain of the *Isla de Panay* and her agent, Benjumea, knew that the purpose of concealing the bad condition by making no notation on the bills of lading was to enable the shippers to sell the bills to the consignees as evidence that the casks were shipped in good condition (Record, pp. 146, 210, 212; Opinion, C. C. A., Record, pp. 233 and 238). They also knew that the consignees would in

ordinary course pay for the casks as sound on the faith of the bills of lading before having an opportunity to observe their actual condition.

Captain Muslera of the *Isla de Panay* in answer to the question, "Captain, why are these letters of guarantee given in Seville?" testified as follows:

> "If the bills of lading are issued with a note on them the insurance companies or the bankers in Spain will not accept that bill of lading on account of the condition in which the goods are, but if they have no clause on it THEY WILL PASS IT TO A BANKING HOUSE AND THE INSURANCE COMPANY THAT THEY HAVE BEEN SHIPPED BY THE SHIPPER IN APPARENT GOOD ORDER AND CONDITION, although they have issued a letter of guarantee relieving the company of any responsibility whatsoever for the condition of the packages" (Record, p. 146; Opinion, C. C. A., Record, p. 233). (Capitalization ours.)

See also Record, page 212.

There is nothing on the faces of the bills of lading to indicate to a prospective purchaser that "A. Pastrana," whose name is signed at the bottom as "El Capitan," was not the captain of the *Isla de Panay* (Record, p. 215). The bills of lading were not signed or issued by Pastrana, the captain of the *Mogador,* as the Circuit Court of Appeals inadvertently said (Opinion, C. C. A., Record, p. 232). The bills of lading were issued

in the name of the *Isla de Panay* and were signed solely by Agent Benjumea of the *Isla de Panay* by affixing two rubber stamp signatures on the bills, one reading, "The Captain, A. Pastrana," and the other reading, "The Agent of the Steamer (round stamp) Compania Trasatlantica, Sevilla Agency." Pastrana testified:

> "The bills of lading are exclusively issued by the agent and are signed with a rubber stamp bearing my name. • • • I did not issue, as before stated, the bills of lading, this being done by the agent only" (Record, pp. 152, 168). "I do not issue bills of lading" (Record, p. 168).

The agent, Benjumea, testified:

> "I was acting in the capacity of agent of the Compania Trasatlantica through the power of attorney, copy of which is annexed hereto and marked Exhibit No. 1" (Record, p. 208). "I issue the bills of lading only" (Record, p. 214).

Benjumea further testified that he was authorized to sign bills of lading "as agent" for the captain of the *Isla de Panay* in "the latter's absence" (Record, p. 211). Moreover, Captain Muslera of the *Isla de Panay* specifically admitted that "the shipment of olives in this case was received by the Spanish Line as owners of the *Isla de Panay* at Seville" (Record, p. 144).

Benjumea agreed to and did (Record, pp. 210, 211, 146) name innocent consignees at New York in the bills of lading and omitted notations of

the bad condition of the casks in consideration of secret guarantees by the shippers against the expected claims of the innocent consignees based on "the damages that they [the casks] suffer as natural consequences of the voyage" (Record, p. 221).

These guarantees or letters of indemnity were delivered on November 5th and 8th, 1917, and are printed as Claimant's Exhibits on pages 220 and 221 of the Record. A typical one reads as follows:

"Sevilla, November 5, 1917.

Compania Trasatlantica,
Sevilla.

My dear Sirs:

With reference to the shipment of 227 casks of olives that we are making by the steamer *Isla de Panay* to New York, we understand that that Company considers the containers insufficient and that it does not accept responsibility for the damages that they suffer as natural consequences of the voyage.

And as guarantee of that Company, we sign the present, as you have delivered us clean bills of lading.

Yours very truly,

ROULETT & PYMAN"
(Record, pp. 221, 220).

Two hundred and eighty-five of the casks, "in bad condition," were carried by the *Mo-*

gador down the river to Cadiz and loaded alongside on the *Isla de Panay* (Record, pp. 165, 154, 152). The remaining 69 casks, also "in bad condition," were carried by railway "at shipper's risk" to Cadiz and lightered to the *Isla de Panay* (Record, pp. 155, 156, 210). The captain of the *Mogador* testified that the entire 354 casks were in absolutely the same condition when delivered to the *Isla de Panay* at Cadiz as when received at Seville, no further damage having taken place during the lighter and railway carriage (Record, pp. 154, 155). The captain of the *Isla de Panay* testified that all the casks, although unbroken, were "in very bad condition" (Record, pp. 75, 88, 80, 78, 79, 83, 87) when loaded on the *Isla de Panay*, and that "If I was the shipper of those olives I would never have shipped them in a container such as these, because they would never reach their destination" (Record, p. 80). He shortly afterwards qualified this by saying:

> "That they were old I can say, but I cannot say that they would never reach their destination.
>
> Q. What did you say a moment ago that these containers would never deliver their contents to destination? A. Because I reduce that from the fact, although they were taken on board and very carefully handled, when they were taken out at New York the bad condition in which they were in.
>
> Q. You have been testifying then for the last few questions and answers merely to your deductions, is that the idea? A. No" (Record, p. 80).

The captain of *Isla de Panay* further testified that when the casks were loaded at Cadiz "they were in very bad condition and very old" (Record, pp. 80, 75, 79, 83, 87, 88). The hoops on the casks were so "rusty I could not tell what they were made of" (Record, p. 82); "I am not used to seeing rusty hoops" (Record, p. 82); "You could see that they were very old * * * that the heads were warped, deformed, that they were in very bad condition" (Record, p. 75); "The wood in these was very soggy" (Record, p. 79); "Q. You think those barrels were 20 years old, do you? A. Yes, sir" (Record, p. 79). They were the oldest casks he had "ever seen carrying olives across the Atlantic" (Record, p. 80). "I am not a cooper to say exactly whether the casks were 20 years or 2 years, but from what I saw they were in very bad condition and very old" (Record, p. 80). The other officers of the *Isla de Panay* and the captain of the *Mogador* confirmed the testimony of the captain of the *Isla de Panay* that the casks were in very bad condition and unfit for carriage (Record, pp. 158, 107, 96, 157, 152, 167, 172, 174). The chief officer, the second officer and the carpenter of the *Isla de Panay* also testified that the casks while being "taken aboard and stowed at Cadiz" (Record, p. 107) were leaking, the staves being somewhat apart (Record, pp. 96, 97, 107, 122, 129), and that "some of the hoops broke open and others came off the ends of the casks" while being loaded (Record, pp. 114, 131, 129, 130). No attempt was made to replace the unbroken hoops that had fallen off or to substitute new hoops for those

that broke (Record, pp. 114, 115). The chief officer testified that 325 of the 354 casks were in bad condition (Record, p. 111).

The captain and the second officer of the *Isla de Panay* noted the bad and leaky condition of the casks on the steamship company's secret, inter-agent shipping orders, but failed to note it on the bills of lading (Record, pp. 76, 79, 97, 111). No re-conditioning of the casks was required at any time by the captain or any agent of the *Isla de Panay* or her owner other than the apparently voluntary action of the shippers' cooper in tightening or putting pressure on some of the rusty hoops and in inserting slips of paper between the staves of some of the casks to try to stop leakage "for the time being" (Record, pp. 152, 158, 159, 160). But "all this excessive force was detrimental to the hoops" (Record, p. 160). When pressed as to what re-conditioning of the casks he demanded from the shippers' cooper, the captain of the *Isla de Panay* testified, "I did not talk to the cooper" (Record, p. 88). No demand was made that new hoops be substituted for any of the fifty per cent. (Record, p. 85) which on arrival at New York "if you just touched them [the rusty hoops] they would fall off" and "break off" (Captain of the *Isla de Panay,* Record, p. 77); the heads "were warped and deformed and as the hoops broke off, the weight of the casks being so great, the heads would pop out" (Captain of the *Isla de Panay,* Record, p. 78).

The captain of the *Mogador* testified that it was "customary" for the ship's carpenter of the *Isla de Panay* to recondition leaking casks by "tighten-

ing" the hoops (Record, p. 160); and that if any casks broke or fell apart while loading, "they would have been repaired by the carpenter of the *Isla de Panay*" (Record, p. 165). The chief officer of the *Isla de Panay* testified, however, that not only the broken but also all the loose hoops that fell off the casks while being loaded on the *Isla de Panay* were "thrown away" (Record, p. 114) as "nothing but rubbish" (Record, p. 115), and that the man who was carpenter of the *Panay* was incompetent to replace the hoops (Record, p. 115). The carpenter of the *Panay* testified that the casks were leaking and many of the hoops "came off from all over the barrels" while being loaded on the *Panay*" (Record, pp. 123, 128, 130), but he did not testify that he or any one else replaced them.

The *Isla de Panay* encountered no unusual weather or seas on the voyage to New York.

The captain of the *Isla de Panay* further testified that after the ship arrived at New York when discharging began the hoops on the casks broke and came off "in the hold while they were up in the air and being hoisted and in dock" (Record, p. 78); and that "as the hoops broke off, the weight of the casks being so great, heads would pop out" (Record, p. 78); "You touch them [the casks] only and the hoops would come off and the head would come out and the olives would come all over the dock. They were shoveled back into the casks and set on their heads, put the hoops around them, salt and water, put the head back in order to try to preserve the olives. Out of every two that were unloaded, one would come

apart" (Record, p. 85; see also Record, pp. 77, 86). The ship's evidence showed that this was the only breakage that took place either before or during the voyage (Record, pp. 154, 155, 98).

Both Courts below found that the bills of lading were "clean" (Record, pp. 222, 238, 239) and that the consignees "paid drafts accompanying the bills of lading without knowledge that the containers were old and insufficient" (Record, pp. 222, 239). They further found that the breakage resulted from the frail and unfit condition of the casks at the time the ship accepted them and agreed to carry them to New York. The Courts then concluded that because the ship had not directly represented by a printed clause in the bills of lading that the casks were "in apparent good condition," the petitioners had not sustained the burden of showing a direct misrepresentation, which it held was an essential element of estoppel. The Circuit Court of Appeals, although the point had not been raised nor argued, also added that although the shipowner might be liable in *personam*, the ship was not liable *in rem*. This part of its decision was based on an assumption by the Court that "the bills of lading issued for the casks of olives were issued at Seville by the captain of the *Mogador*. They were not signed at any time by the captain of the *Isla de Panay*" (Record, p. 232), and that the bills of lading "were not signed by any officer of the *Panay* but bore the signature of the captain of the *Mogador*" (Record, p. 235) and therefore "whether the shipowner would have been estopped if the master of the *Panay* had signed the bills of lading is a question not before

us" (Record, p. 241). As appears from the foregoing statement of facts, the Court overlooked the fact that the bills of lading were not issued by the captain of the *Mogador,* but by Agent Benjumea of the *Isla de Panay* in her name (Record, pp. 152, 215, 218, 144).

> *The statement of counsel for the Isla de Panay at page 3 of his brief in reply to the petition that "The casks here were in apparent good order and condition when received for shipment by the respondent in Seville" is in conflict with the findings of both Courts below and with his own evidence.*

Counsel for the *Isla de Panay* at page 3 of his brief in reply to the petition for certiorari, says:

> "The casks here were, as a matter of fact, in apparent good order and condition when received for shipment by the respondent in Seville."

This statement is immaterial, because admittedly the casks were in apparent bad condition when the bills of lading were issued and delivered to the shippers on November 5th and 8th, 1917. Moreover, this statement of counsel is in conflict with the findings of both Courts below and with the *Isla de Panay's* own uncontradicted testimony. The Circuit Court of Appeals found as follows:

> "The merchandise at the time it was placed on the *Mogador* was in casks which were seen to be so old, weak and defective

> that those in charge at Seville objected to accepting them and the shippers thereupon offered letters of guarantee to take the place of any notations on the bills of lading" (Record, pp. 235 and 236, Opinion C. C. A.).

The District Court found as follows:

> "I think the great weight of evidence is to the effect that the chestnut casks containing the olives were old and insufficient at the time the merchandise left Seville. * * * The steamship company distrusted the containers and insisted upon an agreement of indemnity as a condition of carrying the merchandise under clean bills of lading, which seems to have been given at Seville" (Record, p. 222, Opinion, D. C.).

Moreover, Captain Pastrana of the *Mogador*, who received the casks for the respondent at Seville, testified on direct examination as follows (Record, p. 154):

> "Q. Were the casks containing the merchandise in question damaged in any way while being loaded in the *Mogador,* transported from Seville to Cadiz or while being unloaded from the *Mogador* to your knowledge? A. As just stated, these casks did not suffer any further damage during their loading and transportation on the *Mogador* and their transshipment to the *Isla de Panay.*" (See also pp. 154 and 155 of the Record.)

Pastrana further testified that at Seville:

> "I made a personal inspection sufficient to convince myself of their bad condition. It was not necessary to handle them in order to see their defects" (Record, p. 157); "It was always my practice to make such inspection in order to relieve my Company and myself of responsibility and also as it was my duty, as sole deck officer, and captain, to do so" (Record, p. 157).
>
> The olives "were contained in casks whose outside condition was as follows: (a) the staves were considerably worn and distorted; (b) the hoops were very rusty and, as a consequence, thin; (c) the heads of some of the casks appeared to be convex and others concave with irregularities; (d) brine was leaking from many of the casks which coopers, sent to the dock by the respective shippers, were attempting to stop and prevent further leakage; (e) the casks appeared to be old and weak and were made of chestnut wood and consequently frail; (f) As above stated the casks were repaired on the wharf before being loaded by the coopers of the shippers who repaired the leaks by stuffing paper between the staves. This stopped the leaking for the time being" (Record, p. 152).
>
> "The defective condition of these hoops was apparent to the eye. I could see, without making further investigation due to my experience with containers of this kind, that they were in bad shape. I do not

remember the thickness of the rust" (Record, p. 158).

"My duty as captain is to notify the company of abnormal or bad condition of the cargoes received by me through written orders from the Company. It is the Company that takes the necessary steps to prevent any responsibilities being charged against the Company or the ship" (Record, p. 166). "Objections to the bad condition of the casks were made by the Foreman, Diego Garcia, and myself" (Record, p. 167). "I spoke to the shipper's foreman regarding the bad condition of the casks and refused to take them unless a notation was made on the bills of lading or a consultation held with the agency. I notified the agency of this through the foreman Diego Garcia" (Record, p. 167).

Garcia, a foreman stevedore, who loaded the casks on the *Mogador* at Seville, testified:

The olives were "contained in casks and all of them, those shipped on the *Mogador* as well as those shipped by rail had the same defects, *i. e.*, that the containers were deficient, offering little guarantee of their good arrival in New York" (Record, p. 172). The staves of the casks were "old and weak" (Record, p. 172); the hoops were "rusted and thin" (Record, p. 172). The condition and appearance of the heads of the casks "was bad" (Record, p. 172); "brine was leaking from some of the casks" (Record, p. 172). "In view of the old and

weak condition of the casks, in my own name and that of the *Mogador's* captain, I informed the agent of their bad condition having understood that the agency had pointed out the necessity of making notations on the bills of lading and that the shippers had offered letters of guarantee to take the place of such notations" (Record, p. 174). The heads of the casks were "not broken but they were warped and leaking" (Record, p. 178); "some of them [the hoops] were broken but they were replaced before shipping" (Record, p. 178). Brine was leaking from some of the casks "but I cannot say the exact number" (Record, p. 178). "The looking over of these casks coupled with my long experience with such matters assured me that they were in bad condition" (Record, p. 179). "The bad condition of these casks was clearly seen on moving them and on seeing their warped heads and staves, rusty and thin hoops and the leaking which the shippers' coopers tried to stop" (Record, p. 179). "The captain of the *Mogador* and I myself made objections to the bad condition of the casks" (Record, p. 190). We made the objections "to the foreman of the shippers and to the agent of the *Isla de Panay*" (Record, p. 190). "The substance of what I said to the foreman and to the agent was that the casks were in such bad condition as not to be accepted without notation" (Record, p. 190).

See also the testimony of Boatswain Montiel of the *Mogador* (Record, pp. 174, 178, 179).

The questions for review by this Court are as follows:

> "I. The decision of the lower Courts that although the petitioners were defrauded there can be no estoppel unless there is an express representation by a recital in the bill of lading, is directly contrary to the decisions of this Court and of the Circuit Court of Appeals of other Circuits that an estoppel need consist only of a concealment of a material fact by a person under a duty to disclose it, resulting in prejudice to the person from whom the information has been withheld.
>
> If the *Isla de Panay's* agent were entirely innocent of misrepresentation or fraud, the *Isla de Panay* should nevertheless be held liable under the rule that where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong.
>
> II. The decision of the Circuit Court of Appeals, *sua sponte,* without suggestion of any counsel, that the *Isla de Panay* was not liable *in rem,* is in direct conflict with the decision of this Court in *Bulkley* v. *Naumkeag Steam Cotton Company,* 24 Howard 386, which was not mentioned in the opinion of the Circuit Court of Appeals. It also inadvertently overlooked the facts that the bills of lading were issued in the name of the *Isla de Panay* and were not

delivered to the shippers until after the casks of olives had been loaded on board the *Isla de Panay* on November 4th and 5th, and that they were actually stamped and issued not by the captain of the *Mogador* but by Jose Benjumea, a duly authorized agent of the captain of the *Isla de Panay*" (Petition, pp. 1 and 8).

POINT I.

The decision of the lower courts that although the petitioners were defrauded there can be no estoppel unless there is an express representation by a recital in the bill of lading, is directly contrary to the decisions of this Court and of the Circuit Courts of Appeals of other circuits that an estoppel need consist only of a concealment of a material fact by a person under a duty to disclose it resulting in prejudice to the person from whom the information has been withheld.

Counsel for the respondent, at page 12 of his brief in reply to the petition for certiorari, states the question involved as follows:

> "The precise question presented herein is whether a carrier which receives for shipment apparently defective containers and issues a bill of lading therefor which states nothing one way or the other about their condition, is estopped as against an innocent purchaser of the bill of lading from proving the containers insufficient. This

question has never been previously presented to any court in the United States."

The question as thus stated ignores the admission of the Captain of the *Isla de Panay* that the purpose of the ship in violating the trade usage by issuing the bills of lading without any notation regarding the apparent defects of the casks was to conceal their apparent bad condition and thus enable the shippers to sell the bills to the consignees as "clean" and as representing that the casks when accepted for carriage were apparently in good external condition (Record, p. 146). As consideration for joining in the scheme to deceive, the ship was given prepaid freight and secret letters of indemnity against the expected claims of the deceived consignees. These letters were not attached to the bills of lading nor was any mention made of them on the face of the bills. The corrupt purpose of the ship is also evidenced by the fact that, although she could easily have protected herself by insisting on the issuance of bills of lading naming the shippers or their agents as consignees, she chose to issue bills naming innocent consignees to whom her agent and her captain knew the bills of lading would be sold in due course. The ship thus, with full opportunity to know the apparent bad condition of the goods forming the subject of the contract, contracted directly with third persons who she knew would in ordinary course of business buy the bills of lading without knowledge of the bad condition. It is on these undisputed facts that we contend

that the ship must be held to have misrepresented to the consignees the apparent external condition of the goods, or at least to be estopped from excusing breakage of the casks taking place while in her possession on the ground that they were in apparent bad external condition. The question as stated by counsel for the ship would arise only in a case where such a bill of lading as was issued by the *Isla de Panay* is not regarded by trade usage as a "clean" bill of lading and where the carrier was not guilty of issuing such a bill of lading for the purpose of deceiving an innocent purchaser.

Captain Muslera of the *Isla de Panay,* in answer to the question, "Captain, why are these letters of guarantee given in Seville," said:

> "If the bills of lading are issued with a note on them the insurance companies or the bankers in Spain will not accept that bill of lading on account of the condition in which the goods are, but if they have no clause on it *THEY WILL PASS IT TO A BANKING HOUSE AND THE INSURANCE COMPANY THAT THEY HAVE BEEN SHIPPED BY THE SHIPPER IN APPARENT GOOD ORDER AND CONDITION,* although they have issued a letter of guarantee relieving the company of any responsibility whatsoever for the condition of the packages" (Rec., p. 146). (Capitalization ours.)

This testimony of the captain is quoted in the

opinion of the Circuit Court of Appeals, at page 233 of the record.

The District Court also, in its opinion, said:

> "Libellants are consignees of shipments of olives under clean bills of lading: * * * I think the great weight of evidence is to the effect that the chestnut casks containing the olives were old and insufficient at the time the merchandise left Seville for transshipment to claimant's vessel at Cadiz. The steamship agents distrusted the containers and insisted upon an agreement of indemnity as a condition of carrying the merchandise under clean bills of lading, which seems to have been given at Seville. * * * The libellants paid drafts accompanying the bills of lading without knowledge that the containers were old and insufficient. If there is any liability here for damages, it is upon the theory that by failing to note in the bills of lading any insufficiency in the containers, the steamship misled the libellants to their injury and is now estopped, under the doctrine of *Higgins* v. *Anglo-Algerian Steamship Company*, 248 Fed. 386, to claim that the containers were insufficient. In that case, however, there was in the bill of lading the express representation that the merchandise itself was in apparent good order and condition. * * * No case has gone so far as to hold that a bill of lading containing no words representing the condition of the

> containers would give rise to an estoppel" (Record, pp. 222 and 223).

The Circuit Court of Appeals affirmed this decision (Record, p. 231), and added as the last paragraph in its opinion (Record, p. 242): "In the *Higgins* case [248 Fed. 386] the bills of lading recited that the shipments had been received in good condition. In the instant cases the bills of lading contain no representation as to their condition one way or the other, and the distinction is vital." The Court made no attempt to reconcile this conclusion with the uncontradicted evidence quoted in its opinion that a "clean" bill of lading "indicates that the merchandise was in good condition when it was received from [by] the steamship company" (Opinion, C. C. A., Record, p. 238), and that "the bills of lading which were issued in these cases were what are known as 'clean' bills" (Opinion, C. C. A., Record, p. 238).

It is well settled by decisions of this Court that a concealment of a material fact by a person under a duty to disclose it to another, resulting in prejudice to such person, is sufficient to constitute an estoppel. In *Morgan* v. *Railroad Company*, 96 U. S. 716, 720, this Court said:

> "The appellee insists that the record discloses a case of estoppel *in pais*, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an im-

portant one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. *The Bank of the United States* v. *Lee*, 13 Pet. 107.

He is not permitted to deny a state of things which by his culpable silence or misrepresentation he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. *Merchants' Bank* v. *State Bank*, 10 Wall. 604."

In *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, 108-109, this Court said:

"The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. In consideration of the question before us aid will be derived from an examination of some of the cases in which it has been defined and applied. In *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720, it was held that a party may not deny a state of things which by his culpable silence or misrepresentations he has led another to believe existed, if the latter has acted upon

that belief. 'The doctrine,' the court said, 'always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.' In *Continental Bank* v. *Bank of the Commonwealth*, 50 N. Y. 575, 583, it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. 'Indeed,' said Folger, *J.*, 'it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped, but it has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. *Gaylord* v. *Van Loan*, 15 Wend. 308.' The general doctrine, with proper limitations, was well expressed in *Freeman* v. *Cooke*, 2 Exch. 654, 663, and in *Carr* v. *London & Northwestern Railway Co.*, L. R., 10 C. P. 307. In the first of those cases it was said by Parke, *B.*, for the whole court, that 'if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making

the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect.' And in the other case, Brett, *J.*, speaking for the court, said: 'IF IN THE TRANSACTION ITSELF WHICH IS IN DISPUTE, ONE HAS LED ANOTHER INTO THE BELIEF OF A CERTAIN STATE OF FACTS BY CONDUCT OF CULPABLE NEGLIGENCE CALCULATED TO HAVE THAT RESULT, AND SUCH CULPABLE NEGLIGENCE HAS BEEN THE PROXIMATE CAUSE OF LEADING AND HAS LED THE OTHER TO ACT BY MISTAKE UPON SUCH BELIEF, TO HIS PREJUDICE, THE SECOND CANNOT BE HEARD AFTERWARDS, AS AGAINST THE FIRST, TO SHOW THAT THE STATE OF FACTS REFERRED TO DID NOT EXIST.' See also *Manufacturers' & Traders' Bank* v. *Hazard*, 30 N. Y. 226, 229; *Blair* v. *Wait*, 69 N. Y. 113, 116; *McKenzie* v. *British Linen Co.*, 6 App. Cas., 82, 101; *Miles* v. *McIlwraith*, 8 App. Cas. 120, 133; *Cornish* v. *Abington*, 4 H. & N. 549, 556.

Upon this doctrine, substantially, rests the decision in *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333, 343." (Capitalization our own.)

In *Dickerson* v. *Colgrove*, 100 U. S. 578, 580, this Court said:

"The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled.

> The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice."

In *The United States Bank* v. *Lee,* 13 Peters (38 U. S.), 107, the syllabus in part says:

> "He who holds his peace when he ought to have spoken, shall not be heard now that he should be silent; he is deemed, in equity, a party to the fraud."

In *Stewart* v. *Wyoming Ranch Co.,* 128 U. S. 383, 388, this Court said:

> "In an action of deceit, it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare;* a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that

> what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

The "obligation to speak" has long been recognized by the courts and is of ancient origin. In *Turner* v. *Green* (1895), 2 Ch. 205, 208, the Court said:

> "The distinction between suppression of a fact and mere silence is a very old one, and is to be found in a passage from Cicero (De Off, lib. iii. c. 13), which is cited by Sir Edward Fry in his book (3rd. Ed. p. 329) *'Aliud est celave, aliud tacere; neque enim id est celare quicquid reticeas.'*"

In the present case there was not merely negligence or silence of the *Isla de Panay's* agent, but deliberate and intentional concealment. Her agent did not merely stand by when the bills of lading were issued, but conspired with the shippers to defraud purchasers of the goods shipped. He declined to issue clean bills of lading until the shippers would indemnify him against what he knew would be a result of his fraudulent act. The clean bills of lading were signed by such agent because he would "not accept responsibility for

the damages that they [the goods] suffer as natural consequences of the voyage" (Record, p. 221).

The decisions of the Courts below are also contrary to the decisions of Circuit Courts of Appeal of other circuits.

In *H. Scherer & Co.* v. *Everest,* 168 Federal 822, 829, the Circuit Court of Appeals for the Eighth Circuit said:

> "If so, the purchaser of the notes who took them up in good faith in reliance upon their apparent validity and upon the Decatur Company's apparent ownership of them must suffer for this fraud, while the Transfer Company which made the notes, which knew they were without consideration, which created their false appearance of validity and the false appearance of their ownership by the Decatur Company, escapes the evil consequences of its participation in the fraud. This would be a reversal of the familiar and salutary rule that one who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. *Paxson* v. *Brown,* 61 Fed. 874, 882, 10 C. C. A. 135, 143; *Union Pacific Ry Co.* v. *United States,* 67 Fed. 975, 979, 15 C. C. A. 123,

127; *Illinois Trust & Savings Bank* v. *City of Arkansas City*, 76 Fed. 271, 293, 22 C. C. A. 171, 192, 34 L. R. A. 518; *Given* v. *Times Republican Printing Co.*, 114 Fed. 92, 95, 52 C. C. A. 40, 43; *Mechem on Agency*, Sections 83, 84."

In *The Tampico*, 270 Federal 537, 540, 541, the Circuit Court of Appeals for the Ninth Circuit said:

> "These communications from the appellee answered the appellant's inquiry as to the term of the original charter party. The appellant had asked for a copy of that charter, for the purpose of ascertaning the length of time for which the owner had parted with the right of possession. The letters conveyed that information fully and completely. The appellant had the right to rely on the information so furnished. It had the right to believe that there was no provision in that charter party by which the term thereof could be abbreviated at the option of the owner. The representation was made with the intention that it should be acted upon. It was a representation such as to induce a reasonable and prudent man to believe that it was intended to be acted upon, and the appellant in acting upon it exercised such reasonable diligence as the circumstances required. The situation is the same as it would have been, had the appellee sent the appellant a copy of that charter party, with the optional pro-

vision in favor of the owner inadvertently omitted therefrom." * * *

"It is contended that there can be no estoppel in cases where, as here, the representations were made without fraudulent intent. But the rule is well established that it is not necessary that the representations shall have been made with such an intent. It is sufficient if they are 'of such a character as to induce a reasonable and prudent man to believe that they were intended to be acted on.' 21 C. J. 1121; 10 R. C. L. 691."

There, as in this case, there was a mere concealment without express representation.

The elements of an estoppel *in pais* are stated by Pitney, *J.*, in *Central Railroad Company* v. *MacCartney,* 68 N. J. L. (39 Vroom), 165, 175, 176, as follows:

"1. That the party against whom the estoppel is urged has, on a previous occasion, by words or conduct, made a representation or concealment of material facts inconsistent with the facts forming the basis of his present claim.

2. That such party either knew the facts to be otherwise than represented, or except for gross negligence would have known; or that he pretended to know the facts when he knew that he did not know them.

3. That such representation or concealment was made with the intent to influence

the conduct of another or else was made under such circumstances that a reasonably prudent man would suppose it was intended to be acted upon as true.

4. That the party to whom it was made was ignorant of the facts and had no convenient opportunity to ascertain them.

5. That the latter party in good faith, relied upon the representations or conduct of the other party and thereby was led into such a course of conduct that he will now be substantially prejudiced if the other party be permitted to repudiate his former action or representation."

In the present case:

(1) The *Isla de Panay's* agent admittedly concealed the material fact that at the time he issued the bills of lading the goods were unfit for carriage;

(2) He actually knew that the goods were unfit for carriage, and to protect himself obtained a written guarantee of indemnity from the shippers, without noting on the bill of lading that this guarantee had been executed, and knowing that notice of the guarantee would not be given to the consignee;

(3) Such concealment was made with the intent to influence the consignee to pay the sound value of the goods represented by the bill of lading before having an opportunity to examine the goods;

(4) The consignee was ignorant of the actual condition of the goods, and had no opportunity to examine them, they being in the possession of the *Isla de Panay's* agents on the high seas; and

(5) The consignee in good faith relied upon the conduct of the *Isla de Panay's* agent in accordance with the undisputed trade usage that such bills of lading were clean, and thereby was led into paying cash for the bills of lading on the assumption that they represented sound goods.

These authorities establish that the issuance of a clean bill of lading will estop the shipowner from relying upon bad condition known by him at the time of shipment. He cannot, as the shipowner attempts to do in this case, set up as an excuse for failing to deliver the cargo in good order and condition that the packages were frail when he knew that fact at the time the goods were offered for shipment, and when from his own admission he would not have accepted the goods for shipment but for a secret agreement between himself and the shippers.

As we have shown above, the principle of estoppel is just as effective where one fails to speak, who should have spoken, as it is when an express misrepresentation is made. The gist of the estoppel is that the person who is estopped knew that the person injured would act upon his good faith. And, in this case, where the shipowner (the claimant and owner of the *Isla de Panay*, the actual party to this suit who filed the claim

to the ship) knew that the form of bill of lading which it issued was usually accepted and would be accepted in this case as a clean bill of lading, *i. e.*, a bill of lading acknowledging receipt of the goods in apparent good order and condition, it is, in fact, in identically the same position as if it had used the words "apparent good order and condition" in the bills of lading.

Thus all the elements of an estoppel exist without dispute in this case. Indeed, it is so elementary that a deliberate concealment of a material fact by one under a duty to disclose it is the equivalent of an express representation in constituting an estoppel, that we need only ask this Court to read the facts as stated in the opinions of the two Courts below, and then read the definition of the elements of an estoppel contained in 21 Corpus Juris 1249.

In Williston on Contracts, Volume III, Section 1426, page 2545, it is said:

> "Not only will innocent misrepresentation of a material fact preclude recovery, a doctrine that has now been generally adopted from courts of equity by courts of law, as a ground for rescission, but failure to communicate material facts of which fair dealing demanded the disclosure, will preclude specific performance both of contracts between vendor and purchaser, and contracts of other kinds."

And in Williston on Contracts, Volume III, Section 1497, page 2664, it is said:

> "It has been held with obvious justice that mistake by one party and knowledge of the mistake by the other, will justify relief as fully as mutual mistake."

And in Williston on Contracts, Volume III, Section 1498, page 2665, it is said:

> "There are exceptions to the general rule that silence cannot amount to fraud. While it is nowhere held that collateral circumstances tending to enhance the value of the subject of the sale must be disclosed in the absence of some special relation between the parties, it is held in many States that if the subject-matter of the sale is materially defective to the knowledge of the seller, and the defect is latent, an action of deceit or other remedy based on fraud will lie in favor of a buyer who purchases the goods on the assumption that they are what they seem. * * * It is certainly true that any active conduct or words which tend to produce an erroneous impression may amount to fraud, and HALF THE TRUTH MAY BE A LIE IN EFFECT." (Capitalization ours.)

And in Williston on Contracts, Volume III, Section 1499, page 2666, it is said:

> "Active concealment of the facts, also, would be held fraudulent by some courts which would not hold mere silence suffi-

cient, though it may seem difficult to make out an actual misrepresentation from acts of concealment unknown to the other party. In some contracts, such as insurance and, to a less extent, guaranty failure to disclose material facts is already recognized by the law as fraudulent, and the tendency in the law of sales, as well as in other contracts, is doubtless toward requiring a somewhat higher degree of good faith than formerly, especially where the opportunities for information are not equally open to both parties. In case a fiduciary relation exists between the parties, as that of trustee and *cestui que trust,* guardian and ward, lawyer and client, there is a positive duty, a failure to observe which is constructively fraudulent; and the nature of the transaction or the relation of the parties may be such that as to the particular transaction in question, the duties of a fiduciary are imposed upon one or the other party, and such a relation involves a duty of disclosure."

In *Higgins* v. *Anglo-Algerian S. S. Co.,* 248 Fed. 386, the Circuit Court of Appeals for the Second Circuit, composed of different judges from those who decided the present case, held that a carrier who, knowing that goods are in apparent bad condition, accepts them on letters of guarantee being given and issues bills of lading acknowledging receipt in good condition, is estopped from setting up the fact that the goods were in apparent bad condition when received by it. In the

course to its opinion, the Court said (248 Fed. 386, 387):

> "Further the respondent had the courage to set up as a defense its own complicity in a fraud, viz., that a large number of the cases which had been wet and were stained and discolored by rain were received from lighters; that their stained, damaged, and discolored condition had been noted on the mate's receipts, but that a clean bill of lading was delivered to the shippers at their request, against their agreement to indemnify the respondent against loss for so doing. This was pleaded as an admission binding on the holder of the bill of lading that the cases were not shipped in apparent good order and condition, and a bar to the maintenance of the libel. • • •
>
> Though courts of admiralty are not courts of equity, and may not be able to give affirmative relief in the case of contracts induced by preliminary fraudulent representations (*Williams* v. *Insurance Co., D. C.*, 56 Fed. 159), still they do proceed upon equitable principles and may prevent a party from taking advantage of his own fraud in the contract itself. *Pew* v. *Laughlin* (D. C.) 3 Fed. 39; *The Hero* (D. C.) 6 Fed. 526, and *The Electron* (D. C.) 48 Fed. 689, are examples. To give the carrier the benefit of this exception would be to enable it to protect itself against the consequences of its own fraud."

There are numerous decisions of the Admiralty Courts supporting this same principle.

In *Bradstreet* v. *Heran,* 3 Fed. Cases, page 1183, No. 1792a, Mr. Justice Nelson, sitting on Circuit, held that, where cotton was shipped in obviously bad shipping condition, some of the bales being rotten or burst open, others with the bagging torn and still others with the bagging old and rotten or damaged by wet, the master was negligent and inattentive in accepting the bales as "in good order and well conditioned" and was liable to the consignee, who had made large advances upon the bales on the faith of the representation in the bill of lading that it had been shipped in good order.

In *Martineaus* v. *Royal Mail Steam Packet Co.,* 12 Asp. M. C. 190; 17 Com. Cas. 176, 179-180, Mr. Justice Scrutton said:

> "I think the explanation of the captain's conduct is to be found in his owners' letter of November 10, 1911, 'If all these notations were to appear in bills of lading there would be, as there has been in the past, a great outcry about the unnecessary clausing of bills of lading.' And I suspect that some instructions to this effect, possibly misunderstood by the captain in this case, have not been modified since the decision of Channell, *J.,* drew attention to the importance of an accurate statement of condition on shipment. If the mate's and master's view was the one they took at the time, it yet resulted in a misstatement of

fact, for the bags were not in apparent good order and condition. And in my view, if masters make such statements of fact, they must not guess at the nature of the contents and their effects, but must ask before drawing inferences from the assumed nature of the contents and making statements of fact based thereon" (pp. 179, 180).

See also *Crawford & Law* v. *Allan Line S. S. Co., Ltd.* (1912), A. C. 130; *National Bank* v. *Kershaw Oil Mill,* 202 Fed. 90, 97 (C. C. A. 4).

In *Nelson* v. *Woodruff,* 1 Black (66 U. S.) 156, 168, 169, this Court said:

"The result of our examination of these cases is, that *though the owners of The Maid of Orleans could not controvert the affirmance in these bills of lading, that the lard of the shippers had been received on board of their ship in good order and condition,* that they have made out, by sufficient and satisfactory proofs, that the leakage and diminution of the lard was owing to *existing but not apparent causes,* in the condition of the lard, acting upon the barrels in which it was, which are not within the risks guaranteed against to the shippers by the bill of lading. In conclusion, that the signing of a bill of lading, acknowledging that merchandise had been received in good order and condition, is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the

goods were in good order; but it does not preclude the carrier from showing that the loss proceeded from some cause which existed, *but was not apparent when he received the goods* and which, if shown satisfactorily, will discharge the carrier from liability." (Italics ours.)

If the *Isla de Panay's* agent were entirely innocent of misrepresentation or fraud, the *Isla de Panay* should, nevertheless, be held liable under the rule that, where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong.

It is uncontroverted that the issuance of the bills of lading by the *Isla de Panay's* agent in the form in which they were issued was a necessary step in putting it in the power of the shippers to defraud the consignees.

In *Peoples Bank* v. *The National Bank,* 101 U. S. 181, 183, this Court said:

> "Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequence."

See also *Butler* v. *United States,* 21 Wallace 272; *Pompton* v. *Cooper Union,* 101 U. S. 196.

This is an ancient doctrine. It is announced in *Hern* v. *Nichols,* 1 Salkeld 289:

> "For, seeing somebody must be a loser by

> this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

The rule is stated with pertinence by Lord Romilly in *Briggs* v. *Jones, Law Reports,* 10 Eq. 92, 98:

> "A person who puts it in the power of another to deceive and to raise money must take the consequences. He cannot afterward rely on a particular or different equity."

See also *Sheffield Corp.* v. *Barclay,* L. R. 1905 App. Cas. 392, 397, and *Dugvale* v. *Lovering,* L. R. 10 C. P. 196, 199.

In *Smith* v. *Armour Packing Company,* 158 Fed. 86, 88, the Circuit Court of Appeals for the Eighth Circuit, said:

> "The case presents an apt instance for the application of the wholesome rule that, where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong."

In *H. Scherer & Co.* v. *Everest,* 168 Fed. 822, the Circuit Court of Appeals for the Eighth Circuit, said:

> "The Transfer Company intentionally and with culpable negligence made and intrusted these deceitful representations and the power to use them to its agent, the

Mr. Justice Butler

Decatur Company, and if the latter abused that power the Transfer Company and its successor in interest, the trustee, are estopped from denying that its representations were true for the purpose of defeating the claims of the holders of these notes. When one of two parties must suffer loss from the fault of a third, he who wrongfully or with culpable negligence put it in the power of the third to cause the loss must bear it."

The carrier was under a duty to disclose to the consignees the fact that the casks were apparently in bad external condition and unfit for carriage.

A positive duty to disclose arose in this case from the fact that although the ship's agent could have insisted that the casks be first sufficiently reconditioned (by substituting new heads and hoops) or that the true condition of the goods be noted on the bills of lading he elected to accept the casks while in "very bad condition" and to name and thereby contract with [*Rodocanachi* v. *Milburn* (1886), 18 Q. B. D. 67; *Hinrichs* v. *Bank*, 279 Fed. 382, 386], innocent consignees whom he knew would pay for the bills of lading as representing sound goods before having an opportunity to examine them.

The *Isla de Panay* being a general cargo ship had the same right as any other common carrier, to refuse to accept for carriage goods packed in defective containers. *Hannibal R. R. Co.* v. *Swift*,

79 U. S. 262; *The David & Caroline,* 5 Blatchford 266. Her master had a right to require that such goods be first reconditioned or new casks substituted. A failure to require reconditioning in a necessary case is negligence or malfeasance creating a duty to disclose even if no bill of lading is issued, provided the consignee is other than the shipper.

In *Hannibal Railroad* v. *Swift,* 79 U. S. 262, at p. 272, this Court said: "If objection existed on any of these grounds ["to the manner in which the property was packed"] or any other ground not concealed but open to the observation of the company, *it should have been stated before the property was received.*" (Italics ours.)

And at page 273 (79 U. S.) this Court said:

> "The common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure their safety."

Under such circumstances, therefore, an implication arises that the goods covered by the bill of lading are normally fit to withstand ordinary handling during the carriage and discharge, unless the shipmaster makes notations to the contrary. This implication also arises as a corollary of the principle recognized as to all kinds of contracts that it is the duty of a contracting party

who has exclusive knowledge of material facts, to disclose those facts to the other party. *Strong* v. *Repide,* 213 U. S. 419; 18 Am. & Eng. Encyc. of Law, Second Edition, p. 224; *Molyneux* v. *Hawtrey,* L. R. (1903) 2 K. B. 487; *Carlish* v. *Salt,* L. R. 1906, 1 Ch. 335; *Phillips* v. *Homfray,* L. R. 6 Ch. 770; Williston on Sales (2d Ed.), Secs. 234 and 265; *Cesar* v. *Karutz,* 60 N. Y. 229.

In *Harp* v. *Choctaw O. & G. R. Co.,* 125 Fed. 445, 449-450, the Circuit Court of Appeals for the Eighth Circuit, composed of Circuit Judges Sanborn, Thayer and Van Devanter, said:

> "A common carrier, however, is not bound by the rules of the common law to receive and carry commodities of any and every kind which may be offered to it, but only such as it makes a practice of transporting. * * * Moreover, it is entitled in the first instance by the common law, to establish reasonable rules and regulations governing the manner and form in which it will receive such articles as it professes to carry, and *providing how they shall be packed* for shipment so that they may be handled and transported conveniently, *safely,* and expeditously. Hutchinson on Carriers, sections 111 and 113, and cases there cited." (Italics ours.)

The liability of a common carrier of goods does not primarily, at least, rest on the contract to carry, but is implied by law, having its foundation in the policy of the law, and it is by reason

of this legal obligation that a carrier is charged with the loss of, or injury to, property intrusted to it for carriage. *Railroad Co.* v. *Swift,* 12 Wall. 262; *The Georg Dumois,* 88 Fed. 537, 540.

In *Klauber* v. *American Express Co.,* 21 Wis. 21, 24, 91 Am. Dec. 452, the Court said:

> "The improper packing which will excuse the carrier signifies some internal or latent defect of which the carrier does not know, and from which loss or damage ensues to the goods in the ordinary course of handling or transportation."

In *Atlantic Coast Line R. Co.* v. *Rice,* 169 Ala. 265, 273, 52 So. 918, the Court said:

> "The carrier may, in a proper case, refuse a shipment where in unfit condition for transportation. If so, it must be a necessary consequence that, having accepted the shipment as tendered, its duty is unmodified by the character, sufficiency or insufficiency, open to observation, of the packing of the shipment so received for transportation."

See also:

Union Express Co. v. *Graham,* 26 Ohio St. 595;

Calender v. *Chicago R. Co.,* 99 Minn. 295, 109 N. W. 402;

Northwestern Co. v. *Williams,* 128 Minn. 514, 151 N. W. 419;

The David and Caroline, 7 Fed. Cases No. 3,593;
McCarthy v. *Louisville R. Co.,* 102 Ala. 193, 14 So. 370; and
Kinnick v. *Chicago R. Co.,* 69 Iowa 665, 29 N. W. 772.

In *The Delaware,* 14th Wall. 579, the bill of lading was silent as to whether goods were to be carried on deck or under deck. During the course of the opinion the Court said (at p. 602) "it is settled law in this Court that a *clean bill of lading* imports that the goods are to be safely and properly stowed under deck." The facts in the present case show also that a clean bill of lading imports shipment "in apparent good order and condition" (Opinion Circuit Court of Appeals, Record, p. 33).

A duty to disclose also arose from the trade usage which was testified to by the respondent's witnesses. This usage required that if casks were offered for shipment in apparent bad external condition, the bills of lading should contain notations showing that fact (Opinion, C. C. A., Record, pp. 238, 239; Opinion, D. C., Record, p. 222; Record, pp. 167, 166, 174, 212, 144, 145, 146, 97). The consignees were entitled to rely on this usage.

A duty to disclose also arose from the issuance by the *Isla de Panay* of commercial documents intended for sale to innocent buyers. Admiralty Courts have always held the issuers of bills of

lading to a high standard of fairness. This tends to encourage commerce. If there is no duty of the issuer of a bill of lading intended for sale to an innocent consignee to disclose, at least in a general way, facts obviously impairing the value of the bill of lading, ship's agents will be encouraged to issue confused and ambiguous bills of lading and to tamper with the centuries-old recitals which have made bills of lading a trustworthy and marketable symbol of the goods described and thus permitted the expansion and development of international commerce. *Pollard* v. *Reardon*, 65 Fed. 848 (C. C. A. 1); *Watts* v. *Cargo of Lumber*, 161 Fed. 104 (C. C. A. 2).

The Harter Act.

A duty to disclose also arose from Section 4 of the Harter Act of February 13th, 1893 (7 U. S. Compiled Statutes, pp. 85-87). The Act is quoted in full at page 84 of this brief. Section 4 of the Act is as follows:

> "It shall be the duty of the owner or owners, master or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating among other things, the marks necessary for identification, number of packages or quantity, stating whether it be carrier's or shipper's weight, *AND APPARENT ORDER OR CONDI-*

> ***TION OF SUCH MERCHANDISE OR PROPERTY*** delivered to and received by the owner, master or agent of the vessel for transportation, and such document shall be *prima facie* evidence of receipt of the merchandise therein described." (Capitalization ours.)

The Circuit Court of Appeals held (Record, pp. 240, 241) that the only effect of the violation of this section of the Harter Act by the *Isla de Panay* was the possibility of a fine under Section 5 of the Act. We respectfully submit that the Court erred in so saying. As we view it, Section 4 of the Act created the duty on the part of the shipowner and the master to disclose the apparent condition of the goods for the benefit of innocent purchasers of the goods. In *Knott* v. *Botany Mills*, 179 U. S. 69, this Court construed Section 1 of the Act. That section declares that any provision in a bill of lading, whereby the obligation of the shipowner to use due care in the loading, stowage, custody and care of the cargo is lessened or diminished, shall be void and of no effect. It also provides that the section shall apply to all ships transporting merchandise "from or between ports of the United States and foreign ports." It was argued in this Court that the section did not apply to ships loading abroad. It was urged upon the Court that, to so hold, would involve making vessels in foreign ports subject to the penalty pre-

vided for in Section 5 of the Act. In disposing of this contention, this Court said (at p. 76):

> "Attention was also called to the fourth section of the act, which makes it the duty of the owner, master or agent of 'any vessel transporting merchandise or property from or between ports of the United States' to issue to shippers bills of lading containing a certain description of the goods; and to the fifth section, which provides that, 'for a violation of any of the provisions of this act, the agent, owner or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars,' and the amount of the fine and costs shall be a lien upon the vessel, and she may be libelled therefor in any District Court of the United States within whose jurisdiction she may be found. It was argued that this provision imposing a penalty would cover a refusal to give a bill of lading without the clauses prohibited by the first section; and could not extend to acts done in a foreign port out of the jurisdiction of the United States. But whether that be so or not, (which we are not required in this case to decide,) it affords no sufficient reason for refusing to give full effect, according to what appears to us to be their manifest meaning, to the positive words of the first section, which enact, as to 'any vessel' transporting merchandise or property 'between ports of the United

States and foreign ports,' that all stipulations relieving the carrier from liability for loss or damage arising from negligence in the loading or stowage of the cargo shall not only be unlawful, but shall be null and void and of no effect.'"

It is to be observed that the language of Section 4 is identical with that of Section 1 in respect of the vessels or persons to whom it applies. It is significant that Sections 1 and 4 are the only two sections of the Act which are self-executing. Section 1 declares that any words inserted in a bill of lading for the purpose of imposing contractual obligations which are forbidden by the section, shall be null and void. Section 4, after providing that "it shall be the duty of the owner * * * master, etc.," to issue bills of lading describing the merchandise and stating the apparent order or condition of such merchandise declares that such a document shall be *prima facie* proof of the receipt of the merchandise therein described. It is significant also that, by Section 7 of the Act, Congress treats Section 1 and Section 4 as if they were in a different category from the other sections of the Act. Therefore, it would seem that the conclusions reached by this Court in *Knott* v. *Botany Mills* would apply to any case arising under Section 4.

This Court in *The Delaware*, 161 U. S. 459, 470 *et seq.*, gives the history of the Harter Act. At page 471, it said: "The *fourth* section makes it

obligatory to issue to shippers a bill of lading, stating certain particulars [including apparent condition of the goods], which document shall be *prima facie* evidence of the receipt of the merchandise therein described."

In so far as estoppel is concerned, of what materiality is the provision for a penalty? Congress imposed the obligation on the carrier to speak, and when the ship or her owner failed to do so, why should they be permitted to shield themselves from the legal consequences of such failure by saying that the cargo owner's sole remedy is to permit the Government to claim a penalty?

The natural interpretation of Section 4 would seem to require it to be treated as this Court treated Section 1 in *Knott* v. *Botany Mills*, viz.: to give effect to it in such a case as the present, irrespective of the penalty provisions. This was done by the Circuit Court of Appeals for the First Circuit in *Hansen* v. *American Trading Co.*, 208 Fed. 884. Such a result is not only supported by the decision in *Knott* v. *Botany Mills* but, as the facts of this case show, is necessary if any effect is to be given to the Act in order to protect our importers when foreign shippers and shipowners conspire to defraud American importers. It can hardly be supposed that under the circumstances which existed in this case a demand would be made on the shipowner or master for a bill of lading stating the apparent condition of the goods. The shipper wished to keep the importers in ignorance of the fact that the goods were in apparent bad condition. The shipowner in consider-

ation of the letters of guarantee, aided and abetted the shipper in his purpose to keep the consignees ignorant of that fact. In such a case it is impossible to conceive of the shipper laying the necessary foundation for the penalty by making the demand which Section 5 makes a condition precedent to the claim for a penalty. To say, as the Circuit Court of Appeals says, that the only effect of a violation of Section 4 is to give the right to claim the penalty makes the Act useless in so far as it relates to vessels coming from foreign ports. This obviously was not the intent of Congress. It can hardly be thought that Congress intended the section to apply to vessels loading in foreign ports for the United States and at the same time to make it inoperative in so far as shipments from foreign ports are concerned.

Congress clearly intended Section 4 to benefit the cargo owner. See *The Delaware, supra* (161 U. S.) at p. 474. This section does not abrogate the maritime or common law rules for measuring the actual damages of a cargo owner resulting from a breach of contract. It leaves these rules in full force. Section 5 provides a penalty for any breach recoverable by the Government. But Congress did not provide that the penalty should be a substitute for or impair in any way a cargo owner's measure of actual damages in a contract or tort action against the ship not involving the Government. It did not provide that the penalty should be recoverable as damages in a suit by the cargo owner. A breach of the statutory duty by

the ship, therefore, made the ship liable not only to a penalty to the Government but to the ordinary legal consequences of a breach of such a contract as the Act provided a carrier must make. This Court has always given effect to the plain intent of Congress provided the statute is not unconstitutional. Can it be seriously contended that Congress intended in all cases, no matter how great the actual damages resulting to cargo owners from the breach, that the ship should only be liable to pay a maximum of $2,000 to the Government? It is elementary that a person suffering damages from the breach by another person of a statutory duty created for his benefit may recover his actual damages in a civil suit notwithstanding the Government for the same breach may also recover a fine or penalty. 1 Corpus Juris, 957. The fine or penalty is not conditioned on and has no relation to the actual damages suffered by a private person.

THE COURT BELOW INCORRECTLY DECIDED AS MATTER OF LAW THAT "THE BURDEN OF PROOF RESTED UPON THE LIBELLANTS TO ESTABLISH NEGLIGENCE ON THE PART OF THE CLAIMANT, AND THIS BURDEN WE HAVE NO HESITATION IN SAYING WAS NOT SUSTAINED" (Record, p. 237).

This might perhaps be so if the present suits were by the original shippers. But the suits are by innocent consignees from whom the ship con-

cealed the fact of bad external condition of the casks, and with whom it contracted by naming them as consignees with knowledge (Record, p. 146) that the bills of lading would be sold to them in due course before the casks would arrive at destination. As said in *Higgins* v. *Anglo-Algerian S. S. Co.*, 248 Fed. 386, 388:

> "It is to be noted that in all the foregoing cases the statement, though untrue, was the result of negligence, or misunderstanding, or mistake; whereas, there can be no other explanation of the carrier's conduct in this case than that it was willing to assist the shipper in misleading subsequent holders of the bill of lading, provided he agreed to hold it harmless for so doing. Although a bill of lading is only a quasi negotiable instrument, we are not impressed by the argument that, because the carrier could have set up this defense against a shipper, it can set it up against the subsequent holder of the bill of lading, who was intended to be misled, because he is the assignee of the shipper."

Judge Learned Hand, in his opinion in the District Court, in *Higgins* v. *Anglo-Algerian Steamship Company*, 242 Fed. 568, 571, said:

> "the excuse that a bill of lading is not negotiable has no authority whatever, nor have any of the authorities cited any bearing on the case where a false statement is deliberately inserted to be acted upon by innocent third persons. To allow the ship

to escape liability under such circumstances would be intolerable."

In *Bank of Batavia* v. *N. Y. L. E. & W. R. R. Co.*, 106 N. Y. 200, 201, the Court of Appeals of New York said:

> "While bills of lading are not negotiable in the sense applicable to commercial paper, they are very commonly transferred as security for loans and discounts, and carry with them the ownership, either general or special, of the property which they describe. It is the natural and necessary expectation of the carrier issuing them that they will pass freely from one to another and advances be made upon their faith, and the carrier has no right to believe, and never does believe, that their office and effect is limited to the person to whom they are first and directly issued."

It is an elementary rule of evidence that the burden of bringing forward evidence is on the contracting party who had the exclusive opportunity to examine the goods forming the subject of the contract to show that his failure to perform a promise made with full knowledge of their condition is not due to an apparent defect in the goods which he concealed when making the contract. Jones on Evidence (3rd Edition, 1924), Section 181, page 245. See also *United States* v. *Denver & R. G. R. R.*, 191 U. S. 84, 92.

THE FEDERAL BILLS OF LADING ACT REFERRED TO BY THE CIRCUIT COURT OF APPEALS SPECIFICALLY

STATES IN ITS FIRST SECTION THAT IT DOES NOT APPLY TO A CASE (LIKE THE PRESENT) OF A VOYAGE FROM A FOREIGN PORT TO THE UNITED STATES.

The Circuit Court of Appeals in its opinion, said (Record, p. 239):

> "The bills of lading in the instant cases were straight bills of (fol. 497) lading. The Act of August 29, 1916, known as the Bills of Lading Act, declares 'That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.' 39 Stat. L. p. 539, sec. 2. And the Act makes straight bills non-negotiable and order bills negotiable. Section 29 of the Act provides that a straight bill cannot be negotiated free from existing equities. Where the shipper names another as consignee the title to the goods is in the person so named. *George F. Hinrichs, Inc.* v. *Standard Trust & Savings Bank,* 279 Fed. 382, 386. If the consignee in a straight bill pays the consignor for the goods before he receives them, or directs his banker to pay for him on the presentation of a clean bill of lading he pays at his own risk. If the goods reach him in damaged condition he cannot hold the ship liable unless he can show that the damaged condition of the merchandise was occasioned by the ship's default. In the instant cases no such default on the part of the ship is shown."

But the enacting clause (the first section) of the Bills of Lading Act provides as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or *from* a place in one State *to a place in* the same State through another State or *foreign country,* shall be governed by this act."

The Act by its very terms is inapplicable to a case like the present, of a voyage from a foreign port to a United States port. In this respect the Act differs from the Harter Act. *Knott* v. *Botany Mills,* 179 U. S. 69.

See, also, page 55 of this brief.

THE SUGGESTION OF THE LOWER COURT THAT, ALTHOUGH THE FACTS JUSTIFY A RECOVERY, THE PARTICULAR FORM OF THE PRESENT SUIT IS IMPROPER, IS IN CONFLICT WITH THE DECISIONS OF THIS COURT THAT THE FORM OF THE ACTION IN ADMIRALTY IS IMMATERIAL.

The suggestion in the opinion of the Circuit Court of Appeals that although the facts show a cause of action by the petitioners against the

respondent Compania Trasatlantica or the *Isla de Panay,* the petitioners cannot recover as the suit should be brought in another form for fraud, is, we respectfully submit, in conflict with the decision of this Court in *Dupont* v. *Vance,* 19 Howard (U. S.) 162, that in the Admiralty the form of action is immaterial, provided the facts show a cause of action in favor of the libellant. In the *Dupont* case the suit was for cargo damage, and this Court permitted a recovery as if the action were for general average contribution. Moreover, this Court and the Circuit Courts of Appeals of the various Circuits have often held that in Admiralty the form of action is immaterial. *The Syracuse,* 12 Wallace (79 U. S.) 167, 173; *The Gazelle,* 128 U. S. 474, 487; *Davis* v. *Adams,* 102 Fed. 520, 523 (C. C. A. 9); *Richmond* v. *New Bedford,* Fed. Cases No. 11,800; *The Spica,* 289 Fed. 436, 440 (C. C. A. 2); *Dampskibs* v. *Tropical Co.,* 281 Fed. 740, 742 (C. C. A. 2); *The Volunteer,* 149 Fed. 723 (C. C. A. 2); *The Kalfarli,* 277 Fed. 391, 393 (C. C. A. 2); *The Prudence,* 204 Fed. 66, 69 (C. C. A. 4); *Argos* v. *Buffalo,* 223 Fed. 581, 589 (C. C. A. 6); *Harvard Law Review,* vols. 14, page 464; 15, pages 63 and 418; 19, page 462; and 12, page 501.

The letters of indemnity were offered in evidence by the ship, apparently to show that the casks were in bad external condition when accepted for carriage (Record, pp. 146, 147, 148, 220 and 221). Therefore the claimant of the ship should not be heard to object to a reference

to them. Circuit Judge Ward, speaking for the Circuit Court of Appeals for the Second Circuit, in *Higgins* v. *Anglo-Algerian Steamship Company,* 248 Fed. 386, 389, dealing with a similar situation, said:

> "The respondent insists that, as the libel is founded on contract on the bill of lading, nothing being said about fraud, it would be allowing the libellants to recover on a new and different cause of action if the case were disposed of on that ground. The answer is the respondent itself introduced all the evidence showing the fraud."

The taint of fraud is not in the petitioners' case, but in the claimant's defense. The evidence of fraud, in addition to the letters of indemnity, was introduced by the ship. See especially the testimony, on re-direct examination, of the captain of the *Isla de Panay* (at page 146 of the record), that the bills of lading were issued by the claimant without "a note on them" for the purpose of enabling the shippers to "pass" them to "a banking house and insurance company that they [the goods] have been shipped by the shipper in apparent good order and condition."

The evidence introduced by the ship in defense showed not merely bad condition of the casks, when accepted for carriage, but knowledge by the shipowner of that bad condition, and a deliberate concealment of the fact for the purpose of cooperating with third persons in inducing the innocent consignees to purchase the shipowners' bills of lading in due course as representing casks shipped apparently in good condition.

POINT II.

The decision of the Circuit Court of Appeals, *sua sponte*, without suggestion of counsel, that the *Isla de Panay* was not liable *in rem* is in direct conflict with the decision of this Court in *Bulkley* v. *Naumkeag Steam Cotton Company*, 24 Howard 386, which is not mentioned in the opinion of the Circuit Court of Appeals. It also inadvertently overlooks the facts that the bills of lading were issued in the name of the *Isla de Panay* and were not delivered to the shippers until after the casks of olives had been loaded on board the *Isla de Panay* on November 4th and 5th and that they were actually signed not by the Captain of the *Mogador* but by Jose Benjumea, a duly authorized agent of the Captain of the *Isla de Panay*.

The Circuit Court of Appeals in its opinion in this case said:

> "It is to be kept in mind throughout this opinion that these suits are not *in personam* against the owners of the vessel but they are *in rem* against the ship. If a libellant has a claim against the owners of a ship personally as well as against the ship he may ordinarily enforce it by uniting the two and bring his libel *in personam* and *in rem*. But that has not been done in the pending suits. The (fol. 490) libels allege that there was placed on board the steamship at Cadiz 'in good order and con-

dition' certain merchandise to be delivered to the libellants at the port of New York 'in like good order and condition as when shipped.' They allege that when the goods were discharged in New York they were not in like good order and condition as when shipped but badly damaged.

Now it is evident from what has been already stated that this court is abundantly satisfied that the goods when they were put on board the *Panay* were not in good order and condition but were in very bad order and condition because they were packed in insufficient containers. It is also clear that when the merchandise arrived in New York it was badly damaged but that the damage was not due to faulty stowage or negligent handling by the ship. It also appears that the bills of lading were not signed by any officer of the *Panay* but bore the signature of the captain of the *Mogador*. And that the merchandise at the time it was placed on the *Mogador* was in casks which were seen to be so old, weak and defective that those in charge at Seville objected to accepting them and the shippers, thereupon, offered letters of guarantee to take the place of any notations on the bills of lading, a practice which appears to be quite common in Spain. Under these circumstances we do not see how the libel can be maintained against the *Panay*" (Record, pp. 235, 236).

We submit that the decision of the Circuit

Court of Appeals is in direct conflict with the decision of this Court in the case of *Bulkley v. Naumkeag Steam Cotton Company*, 24 Howard (U. S.), 386, and also assumes facts not in the Record. In the *Bulkley* case, as here, the ocean vessel lay at a place at some distance from the town or place where the merchandise was tendered to the owner of the ocean vessel for shipment. In that case the ocean vessel, the barque *Edwin* lay outside "the bar" at the entrance to Mobile Bay, about thirty miles (according to the charts and Bowditch) from Mobile City where the cotton was tendered for shipment. The master of the barque "employed the steamer *M. Streck*" (24 Howard 386, 390) to bring the cotton from Mobile City down to the bay to the barque. In that case, as here, a usage was shown of lightering the goods from the place of shipment to the ocean vessel. There, as here, the ocean vessel, because of her deep draught, was unable to go to the place where the goods were delivered for shipment, and a steam lighter was hired to carry the goods from such place to the vessel. There, as here, a bill of lading was issued in the name of the ocean vessel. This Court held in the *Bulkley* case that delivery of the goods to the river steamer was a delivery to the master of the ocean vessel, and that the carriage by the river steamer to the ocean vessel was part of the contract voyage, for the due execution of which the ocean vessel was liable *in rem*. In disposing of reasons like those advanced by the Circuit Court

of Appeals in support of its decision, this Court said:

> "It is insisted, however, that the vessel is exempt from responsibility upon the ground that the one hundred bales were never laden on board of her, and we are referred to several cases in this Court and in England in support of the position. But it will be seen, on reference to these cases, the doctrine was applied, or asserted, upon a state of facts wholly different from those in the present case. In the cases where the point was ruled, the goods were not only not laden on board the vessel, but they never had been delivered to the master. There was no contract of affreightment binding between the parties, as there had been no fulfillment on the part of the shipper, namely, the delivery of the cargo.
> * * *
>
> In the present case THE CARGO WAS DELIVERED IN PURSUANCE OF THE CONTRACT, THE GOODS IN THE CUSTODY OF THE MASTER, AND SUBJECT TO HIS LIEN FOR FREIGHT, AS EFFECTUALLY AS IF THEY HAD BEEN UPON THE DECK OF THE SHIP, THE CONTRACT CONFESSEDLY BINDING BOTH THE OWNER AND THE SHIPPER; and, unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it.
>
> The argument urged against this lien of the shipper seems to go the length of main-

taining, that in order to uphold it there must be a physical connection between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship, as a foundation upon which to rest this liability. The unloading of the vessel at the port of discharge, upon the wharf, or even the deposit of the goods in the warehouse, does not discharge the lien, unless the delivery is to the consignee of the cargo, within the meaning of the bill of lading; and we do not see why the lien may not attach, when the cargo is delivered to the master for shipment before it reaches the hold of the vessel, as consistently and with as much reason as the continuance of it after separation from the vessel, and placed upon the wharf, or within the warehouse. In both instances the cargo is in the custody of the master, and in the act of conveyance in the execution of the contract of affreightment. We must look to the substance and good sense of the transaction; to the contract, as understood and intended by the parties, and as explained by its terms, and the attending circumstances out

> of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained, in order to determine the scope and extent of them; and, in this view we think no well-founded distinction can be made, as to the liability of the owner and vessel, between the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case as made, after the loading of the goods upon the deck of the vessel; the one a constructive, the other an actual possession; the former, the same as if the goods had been carried to the vessel by her boats, instead of the vessel going herself to the wharf." (Capitalization our own.)

This decision has been consistently followed and has been recognized as one of the leading admiralty decisions of this Court (see Ames' Cases on Admiralty); *Insurance Company of North America* v. *North German Lloyd Insurance Company*, 106 Fed. 973; *The Pokanoket*, 161 Fed. 383; *Pearce* v. *The Thomas Newton*, 41 Fed. 106.

This Court recently had occasion, in the case of *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, (*The Saigon Maru*), 260 U. S. 490, to approve the decision in the *Bulkley* case on the ground that the master, through his agent, had possession of the merchandise with the power of asserting a lien.

In reaching its decision on this point, moreover, the Circuit Court of Appeals assumed a state of facts not justified by the record and not found by the District Court or even suggested by opposing counsel. As we have stated, the point was not raised by opposing counsel but was passed upon by the Court without notice to any counsel and without an opportunity for argument.

The bills of lading in the present case show on their faces that the owners of the *Isla de Panay* acknowledge receipt of the goods on board the steamship *Isla de Panay*, and, in so far as innocent purchasers are concerned, they give the appearance of being signed by the master of the *Isla de Panay* (Record, Bill of Lading, pp. 214-215 and 218). It is specifically admitted that the casks were received from the shippers by an agent of the *Isla de Panay* (Record, p. 144). The bills of lading were not issued by the captain of the *Mogador*, as stated by the Circuit Court of Appeals in its opinion, at page 232 of the record. The bills of lading, as already indicated, recited "shipped on board the Spanish steamer *Isla de Panay*" (Record, p. 215), and the rubber stamp signatures "A. Pastrana, El Capitan" (Record, p. 218) and "The Agent of the Steamer (Round Stamp) Compania Trasatlantica, Sevilla Agency" (Record, p. 218) were affixed by general agent Benjumea of the owner of the *Isla de Panay*, who testified that he had authority in the absence of the captain of the *Isla de Panay* to issue bills of lading for the *Isla de Panay* (Record, p. 211).

Pastrana testified:

> "I do not issue bills of lading" (Record, p. 168); "The bills of lading were signed by a rubber stamp bearing my signature. I suppose they were not delivered by the agency until the letter of guarantee had been received" (Record, p. 168); "What I did was to accept these casks aboard my vessel following written instruction from the agent having previously consulted with the agent regarding their bad condition. The bills of lading are exclusively issued by the agent and are signed with a rubber stamp bearing my name. The signatures on claimant's exhibits numbers 2, 3 and 4 shown to me by the commissioner are those of the rubber stamp bearing my name and I acknowledge them to be mine. I did not issue, as before stated, the bills of lading, this being done by the agent only, but I knew that on account of the bad condition in which the casks were received, the agent after being informed by me of their condition, demanded and obtained of the shippers letters of guarantee relieving the Compania Trasatlantica from all responsibility for damaged condition on arrival at port of destination" (Record, p. 152).

Jose Benjumea testified:

> "I was acting in the capacity of agent of the Compania Trasatlantica through the power of attorney, copy of which is annexed hereto and marked exhibit No. 1,

> granted me by my brother Eduardo Benjumea who was appointed by the head office" (Record, p. 208); "The reason why the copies of the bill of lading No. 4 for New York covering the 69 casks referred to above which were signed with a rubber stamp bearing the name of the captain of the *Mogador* as though these casks had been transported to Cadiz by the *Mogador* instead of by rail as they finally were shipped, was due to their having been admitted in the belief that they could be transported in the *Mogador*" (Record, p. 211); "The only importance attached to this procedure is the bills of lading having been signed by the Captain of the *Mogador* instead of by the Captain of the *Isla de Panay* or *myself as agent due to the latter's absence.* The company had absolute confidence in both these captains" (Record, p. 211).

We submit that such bills of lading are as much the act of the master of the *Isla de Panay* as if the master of the *Isla de Panay* had personally signed them.

See *The Delaware,* 14 Wallace (81 U. S.), 579, 600, where this Court said:

> "Regularly the goods ought to be on board before the bill of lading is signed, but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the ware-

house of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on these goods as between the shipper and the carrier by way of relation and *estoppel*, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument." (Italics ours.)

In *The City of Alexandria*, 28 Fed. 202, Judge Wallace, an able Admiralty Judge, held that authority to accept delivery for and to bind the vessel may be conferred by an express grant, or the conduct and relations of the parties may establish such an apparent authority that the carrier will be estopped from denying its existence to a shipper who has been misled thereby, and that, as delivery of the merchandise to the lighter was equivalent to delivery to the owners of the steamer, the steamer was liable *in rem*, notwithstanding the loss occurred

before the tobacco, which was the merchandise damaged on the *City of Alexandria*, was actually laden on board of that vessel. The point was urged in that case that the master had not, in fact, personally signed the bill of lading. Judge Wallace, in disposing of this point, said (at p. 206):

> "Inasmuch as the master is but the agent for the owner of the vessel, this case cannot be distinguished from the case cited (the *Bulkley* case), if the owners themselves authorized the libellants to deliver their goods to the lighters of Mendez & Co., and have treated such a delivery as a delivery to their steamer."

Moreover, here the claimant and owner of the *Isla de Panay* bases its defense on an exception in the bill of lading. It is, therefore, estopped to deny the agency of the person who actually signed them.

In the *Isle de Sumatra*, 286 Fed. 437, the syllabus reads:

> "Where a shipowner relies on exceptions in the bill of lading to relieve it from liability for damage to cargo it is estopped to deny the agency of the person who signed the bills of lading in its behalf and has the burden to prove his want of authority to make a further contract with respect to the shipment."

United States Circuit Judge Ward said (286 Fed. 437, 438):

> "Agency may be proved circumstantially as well as expressly. * * * The authority of Ibanez to act for the steamer is shown by the fact that he did bring her to Gardia for the onions, that he prevented her master from taking shipments of onions which had been offered by other parties, and *that he signed the bills of lading for the onions shipped* by Carda consigned to Schnell & Co. *As the shipowners rely upon exceptions in the bills of lading, they are estopped from denying the authority of Ibanez as to them.*"

And in *The Taurus,* 286 Fed. 435, the ship was held liable *in rem* because—

> "The bills of lading were signed by the general agent of the steamer."

In *Stumore* v. *Breen* (1887), 12 Appeal Cas. 698, 702, the House of Lords of England, speaking through Lord Watson, said:

> "Of course the owner may supersede in so far the functions of the master, by committing to another agent the power or the duty of settling the whole terms of the bills of lading, including the fact of shipment and also the date."

The owner of the *Isla de Panay* accepted delivery of the casks to its lighter *Mogador*, as a

delivery to the *Isla de Panay.* This fact cannot be controverted, because the bills of lading as issued by the owners of the *Isla de Panay* admit in words the delivery to the *Isla de Panay.* Moreover, the bills of lading were not delivered to the shippers until after the olives had been laden on board the *Isla de Panay.*

Captain Muslera of the *Isla de Panay* testified:

> "Q. How many hours was this ship at Cadiz? A. One day.
>
> Q. How many hours? A. Arriving in the morning of the 4th [of November, 1917] and sailed in the afternoon of the 5th, about 30 hours.
>
> Q. When were these olives put on board? A. Day and night" (Record, p. 81).

There were only 354 casks in all three of the petitioners' shipments. The bills of lading specifically state (see Bill of Lading, Record, p. 215) that the casks were "shipped on board the Spanish steamship *Isla de Panay.*"

Although the bills of lading are incorrectly dated "Seville, October 27th, 1917," both Agent Benjumea and Captain Pastrana testified that they were in fact not issued to the shippers until after letters of indemnity had been given by the shippers on November 5th and 8th, 1917.

Agent Benjumea testified:

> "I received the three letters of guarantee already mentioned before making delivery of the bills of lading to the shippers"

(Record, p. 214); "The bills of lading were not delivered to the shippers until the corresponding letters of guarantee had been given to the company's agent" (Record, p. 212); "The letters of guarantee were issued at the request of the shipper to take the place of notations on the bills of lading which they wanted to have clean" (Record, p. 212); "I issued the bills of lading only" (Record, p. 214); "The bills of lading were signed with a rubber stamp bearing my signature. I suppose they were not delivered by the agency until the letter of guarantee had been received" (Record, p. 168).

Two of the letters of guarantee were given on November 5th and the third on November 8th, 1917 (Record, pp. 220 and 221). These letters were introduced by counsel for the *Isla de Panay*. The uncontradicted evidence therefore shows that the bills of lading in the present case were not issued to the shippers until the goods were on board the *Isla de Panay* on November 5th and 8th, 1917.

Moreover, the *Isla de Panay's* own evidence shows that none of the petitioner's casks was broken until they were being loaded on and carried and discharged by the *Isla de Panay*. The evidence relating to their unbroken but "very bad condition" when accepted for carriage by the *Isla de Panay* is recited in the Statement of Facts on pages 9 to 11 of this brief (Record, pp. 75, 79, 80, 81, 82, 83, 87, 88, 96, 107, 152, 154, 157 and 158). The evidence relating to their broken condition

with contents coming out "all over the dock" (Record, p. 85) when discharged by the *Isla de Panay* at New York is recited on pages 12 and 13 of this brief.

The breakage of the casks having taken place while in the *Isla de Panay's* custody, she, like any bailee or carrier, is liable *in rem* irrespective of the bills of lading. *Railroad Co.* v. *Swift*, 12 Wall. (U. S.) 262; *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co. (The Saigon Maru)*, 260 U. S. 490.

We have stated these facts in some detail, because they show how similar the present case is to the *Bulkley* and the *Osaka* cases. The bills of lading were signed on behalf of the master of the *Isla de Panay* (Record, p. 215). The goods were damaged while in the custody of the ship (p. 12 of this brief). The lighterage was merely a convenient method to permit the owners of the *Isla de Panay* to accept the cargo for her at Seville for carriage by her to New York, without the loss of time and possible damage of taking so large a steamer up the river to Seville. These conclusions irresistibly follow from the claimants' own evidence and are those which it is manifest that the claimants desired those dealing in its bills of lading to form. Otherwise the insertion by the claimant in the bills of lading of the fact that the goods had been shipped on board the *Isla de Panay* is misleading. It is of no significance that Cadiz was some seventy miles from Seville. In the *Bulkley* case the bar of Mobile Bay, where the

ocean carrier lay to receive cargo shipped at Mobile City, appears from the charts and Bowditch to be about thirty miles from Mobile City. In that case also a steamer was employed as a lighter to take cargo from the City to the ocean carrier. This Court had no difficulty in holding that when bills of lading were issued by the master, the ship was responsible. The only difference here is that the bills of lading were signed by the agent.

> "The only importance attached to this procedure is the bills of lading having been signed by the captain of the *Mogador* instead of by the captain of the *Isla de Panay* or myself as agent due to the latter's absence" (Record, p. 211).

Thus it appears that the two cases are on all fours. The only distinction is one favorable to our case, viz., that the breakage and consequent loss of the cargo of the *Isla de Panay* occurred after the cargo was delivered to her; whereas in the *Bulkley* case the damage occurred before the cotton reached her deck. Under these circumstances, we respectfully submit that the Circuit Court of Appeals was clearly in error when it held that the *Isla de Panay* was not liable *in rem* to these petitioners.

THE FICTION OF *IN REM* LIABILITY SHOULD NOT BE USED TO CLOAK A FRAUD OF THE OWNER OF THE SHIP WHERE HE HAS PERSONALLY APPEARED AND DEFENDED AS CLAIMANT.

In the course of its opinion, the Circuit Court of Appeals carried the fiction of *in rem* liability to the extreme of holding that as the letters of indemnity were addressed to the owner of the ship and not to the ship herself or her master they could not affect her liability. The Court said (Record, p. 240):

> "These letters of guarantee were not addressed to the *Panay* or to its Captain or Master, but to the Compania Transatlantica, Seville, and were dated November 5, 1917, which was the day on which the *Panay* sailed from Cadiz. As neither the Captain or any other officer of the *Panay* ever had anything to do with these letters or even saw them until they saw them in New York at or about the time of the trial we confess inability to see how the letters impose upon the ship a liability which otherwise does not exist. So far as they could have any effect they were intended to protect from liability, not to impose it."

It is difficult to understand what the Court had in mind when it suggested that "these letters of guarantee were not addressed to the *Panay* or to its captain or master, but to the Compania Trasatlantica" (Record, p. 240). The *Panay* is only an inanimate object, and the captain or master merely an employee of the Compania Trasatlantica. Furthermore, that Company claimed the *Panay* in the present suit as sole owner, and has itself introduced the letters of guarantee and the bills of lading as relating to

the liability of the *Panay*. The conclusion of the Circuit Court of Appeals wholly ignores the fact that the owner of the *Isla de Panay*, to whom the letters of guarantee were addressed, voluntarily made itself a party to this suit by appearing as owner and claimant of the vessel. The answer is in its name as owner and claimant. Consequently, it is as much a party to the suit as if suit had been brought against it in the first instance. Certainly where the elements of fraud exist, the fact of the form of action should not relieve a person guilty of such fraud from the consequences of his guilt. No man should be permitted to come into court, saying "It is true that I have been guilty of fraud, but I am not to be held liable for the consequences of my fraud, because this is a suit against my property and not against me." See *The Eugene F. Moran*, 212 U. S. 466, 474; *The Western Maid*, 257 U. S. 419.

It seems impossible to reconcile the decision of the Circuit Court of Appeals with the decision of the same Court (but composed of Circuit Judges Wallace, Lacombe and Cox) in the case of *The Minnetonka*, 146 Fed. 509, 515. In that case, a suit *in rem* against a ship, the Court permitted a recovery *in personam* against the claimant of the sum of $2,000 in excess of the *in rem* liability of $5,000. The Court said (146 Fed. 515):

> "The question, then, is, shall the libelant be precluded from recovering the full amount of her damages because, through inadvertence, she stated them in her pleading

at $2,000 less than they actually are? Were this an ordinary action at common law or in equity, to state the question would be to answer it. Amendments conforming the pleadings to the proof are constantly being permitted under similar conditions. No case has been cited and we have been unable to find one preventing the court, sitting in admiralty, from exercising a sound discretion in allowing amendments where the object is merely to correct an estimate as to value, involving the introduction of no new facts or change in the cause of action. *The Atlantic Transport Company appeared in the action as claimant, and it was within the power of the court to direct a decree against it for the balance of the libelant's loss.* A court of admiralty has powers akin to those of a court of equity, and should not be hampered in its efforts to reach a substantial justice by the inexorable rules invoked by the claimant. As it was said by the Supreme Court:

> 'It is objected that the libel does not specifically charge this antecedent negligence as a fault. This is true, and the libel is defective on that account, but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libelant if the court can see there was no design on his part in omitting to state them. There

> is no doctrine of mere technical variance in the admiralty, and, subject to the rule above stated, it is the duty of the court to extract the real case from the whole record and decide accordingly.' *The Syracuse*, 79 U. S. 167, 20 L. Ed. 382." (Italics ours.)

Here the situation is distinctly more favorable to the libellants than it was in the case of *The Minnetonka*. In that case the question was whether the shipowner, by a general appearance in a suit *in rem*, as owner and claimant of the *res*, had submitted itself to personal liability in excess of the sum for which it had bonded the vessel. The Court held in the affirmative. But, in the present case, the only recovery sought is a sum less than that for which the claimant has bonded the vessel. That the Court had power to enter a decree against the claimant to this extent appears to have been undisputed in *The Minnetonka* case. The principle of the decision in the Second Circuit, in *The Minnetonka*, has also been recognized in the Third Circuit in *The Southwark*, 129 Fed. 171 (E. D. Pa.).

There is therefore no reason why the Court should aid the claimant by invoking a strained construction of the *in rem* fiction.

CONCLUSION.

The decision below is that a carrier by remaining silent when under a duty to speak can issue bills of lading in a form which he knows will aid

in deceiving a buyer, and, when the buyer has been deceived, can use the fact concealed as an excuse for the breach of duty. Such a decision if permitted to stand will not only seriously impair the value of bills of lading as trustworthy documents, but will tend to induce shipowners generally to issue bills of lading in a form which Congress by Section 4 of the Harter Act has expressly disapproved.

Nor is it any answer to say, as the Circuit Court of Appeals did of its own motion, that because the casks were carried to the *Isla de Panay* by one of her owner's river steamers there is no liability of her owner in these suits inasmuch as it is claiming and defending here only as owner of the *Isla de Panay*. Such a decision overlooks the following facts:

1. The bills of lading were issued not by the captain of the river steamer, but by one of the *Isla de Panay's* authorized agents, expressly in the name of the *Isla de Panay;*

2. The bills of lading were not delivered to the shippers until after receipt of the casks on board the *Isla de Panay;*

3. The breakage of the casks took place not on the river steamer, but while in the custody of the *Isla de Panay;* and

4. This Court has decided in the *Bulkley* case (24 Howard 386) that river steamship lighterage

to seaport under the control and at the expense of an ocean steamer is part of the ocean steamer's carriage service, and that for loss of cargo during the lighterage the ocean steamer is liable *in rem*.

Dated, New York City, January 9, 1925.

Respectfully submitted,

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

Appendix.

The Harter Act.

(Act of Feb. 13, 1893, ch. 105; U. S. Comp. Stats. 1916, secs. 8029 to 8035.)

An Act relating to the navigation of vessels, bills of lading and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled that:

"Sec. 1. It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United

States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Sec. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agents, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the

goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Sec. 4. It shall be the duty of the owner or owners, master or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

Sec. 5. For a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by

such violation, and the remainder to the Government of the United States.

Sec. 6. This act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals.

Sec. 8. That this Act shall take effect from and after the first day of July, eighteen hundred and ninety-three."

Approved, February 13th, 1893.

10

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WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924—NOS. 199, 200 and 201.

AUSTIN NICHOLS & COMPANY, EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners trading as E. Sanchez & Company, and E. TOLIBIA & COMPANY,

Petitioners,

—against—

Steamship "ISLA DE PANAY"; COMPANIA TRASATLANTICA,

Claimant-Respondent.

REPLY BRIEF FOR PETITIONERS.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

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REPLY BRIEF FOR PETITIONERS.

The Claimant-Respondent Introduced the Letters of Guarantee Not Merely for Purposes of Indentification But as Exhibits.

The claimant-respondent, on page 69 of its brief says:

> "On page 59 [of the petitioners' brief] it is said that the letters of guarantee were offered in evidence by the ship. This is not true. They were simply marked for identification" (p. 148, fol. 266).

On page 209 of the Record, Jose Benjumea, the

claimant-respondent's agent, in the commission issued to Seville, was asked by counsel for the claimant-respondent the following question:

> "If you state that you demanded letters of guarantee from the consignors, please state whether Claimant's Exhibits 13, 14 and 15 for Identification, which are shown to you by the Commissioner, are the letters of guarantee which you received from said consignors, and if so, have them marked as exhibits by the Commissioner and attached to your answer."

Benjumea answered as follows (Record, p. 210):

> "I ordered the acceptance of the letters of guarantee mentioned in this question and numbered 13-14-15 in claimant's exhibit submitted for identification which were shown to me by the Commissioner and identified by me in accordance with my answers and marked Exhibits Numbers 2-3-4."

The three letters of guarantee are printed on pages 220 and 221 of the Record and show on their faces that they were marked as exhibits by the American Consul: "Exhibit No. 2—Robert Harnden, Consul of the U. S. of America" (Record, p. 220); "Exhibit No. 3—Robert Harnden, Consul of the U. S. of America" (Record, p. 221); "Exhibit No. 4—Robert Harnden, Consul of the U. S. of America" (Record, p. 221). The commission to which these exhibits were attached was signed by "Robert Harnden, Consul of the U. S. of America" (Record, p. 215). This commission and the exhibits were returned by the American Consul and filed on March 18, 1922 (Record, p. 1).

Benjumea, the Claimant-Respondent's Agent at Seville Had Authority to Issue Bills of Lading Binding the Isla de Panay.

At pages 55 and 56 of its brief the claimant-respondent says:

> "In their statement of facts at page 4 and, in fact, throughout their brief, the petitioners refer to Jose Benjumea of Seville, Spain, as the agent of the steamship *Isla de Panay*. Benjumea was not the agent of the *Isla de Panay* but the agent of the Compania Trasatlantica at Seville. * * * The appointment of a certain person as the representative of the Compania Trasatlantica at Seville did not *ipso facto* constitute him the agent of all of that company's vessels, in whatever trade engaged."

At page 208 of the Record, Jose Benjumea testified:

> "I was acting in the capacity of agent of the Compania Trasatlantica through the power of attorney, copy of which is annexed hereto and marked Exhibit No. 1."

At page 210 of the Record Jose Benjumea testified that "the shipping notes for New York were sent to *THIS AGENCY FOR THE S. S. ISLA DE PANAY*." This specific admission by Benjumea that he was an agent "for the S. S. *Isla de Panay*" was made on direct examination by counsel for the claimant-respondent. Even without this admission the claimant-respondent's own evidence shows that Jose Benjumea was the agent of the *Isla de Panay*. The bill of lading which

was introduced by claimant as its Exhibit No. 2 (Record, p. 215) recites "shipped on board the Spanish steamer *Isla de Panay*" and counsel for the claimant-respondent admits, at page 58 of his brief, that "the captain's name was affixed thereto (to the bills of lading) by the Company's agent with a rubber stamp," and at page 38 of his brief, that "the guarantees were delivered to the claimant-respondent's agent at Seville in return for the bills of lading." Moreover, Benjumea testified that "I issued the bills of lading only" (Record, p. 214). Furthermore, counsel for the claimant-respondent did not at any time question the authority of Jose Benjumea to act as agent for the *Isla de Panay* until he filed his brief in this court.

But aside from these considerations, the answer alleges, "that the bills of lading for the carriage of the said merchandise hereinabove referred to contained, among others, the following provisions, terms and stipulations, subject to which the carriage was expressly made" (Record, pp. 4, 10, 16). The answer sets forth the terms of the bills of lading at some length. In paragraph 9 of the answer (Record, pp. 6, 12, 18, 19) it is alleged that the bill of lading was a contract between the *Isla de Panay* and the petitioners and that the *Isla de Panay* performed all of the duties laid upon it under the bills of lading. The bills of lading were introduced in evidence by the claimant at the trial as "Claimant's Exhibit 2" (Record, p. 215). Under these circumstances, no argument is necessary to show that the claimant by its pleadings and by its own evidence has adopted the contract and has ratified the agency

of Benjumea when he issued these bills of lading on behalf of the steamship *Isla de Panay.*

At page 60 of its brief, the claimant-respondent admits that "the bills of lading which were dated on or about October 27, 1917, were delivered about November 5, 1917, at which time the cargo had left Seville," and at page 38 of its brief, the claimant-respondent says: "The guarantees were delivered to the claimant-respondent's agent at Seville in return for the bills of lading." The guarantees were dated November 5th and 8th, 1917 (Record, pp. 220 and 221). The casks were loaded on board the *Isla de Panay* "day and night" on November 4th and 5th, 1917 (Record, p. 81). She sailed from Cadiz with the casks on board at 5 P. M. on November 5, 1917 (Record, pp. 81, 98). Therefore, at the time that Jose Benjumea issued and delivered the bills of lading to the shippers, the petitioners' shipments were on board the *Isla de Panay.* No other bills of lading covering petitioners' shipments were issued by the Captain or any other agent of the *Isla de Panay* or of the claimant-respondent. The bills of lading issued by Jose Benjumea recited "shipped on board the Spanish steamer *Isla de Panay*" (Record, p. 215). There is nothing on the faces of the bills of lading to indicate to anyone that the bills of lading were other than the ordinary ship's bills of lading of the *Isla de Panay.* The rubber stamp signatures, affixed to the bills of lading by Jose Benjumea, read as follows:

"The Captain. A. Pastrana."

"The Agent of the steamer (round stamp) Compania Trasatlantica, Seville Agency"

(Record, p. 218; see particularly the photostat copy of the bill of lading between pp. 214 and 215 of the Record).

The Issues as Defined in Claimant-Respondent's Brief.

A reading of the four points made by the claimant-respondent in its brief discloses that they really state only two defenses (1) the bill of lading clause excepting liability for breakage and the third section of the Harter Act excepting liability for "insufficiency of package"; and (2) that this Court should overrule the decision in the *Higgins* case, 248 Fed. 386, that the ship is estopped from relying on insufficiency of package. As the second point is conditioned on the first, the petitioners should recover if either point is not sustained.

POINT I.

The bill of lading exception of breakage, and the Harter Act exception of insufficiency of package, which counsel for the claimant relies upon in his brief as an excuse for failure to perform, is of no avail, because "underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—viz., that the shipowners have" used ordinary skill and prudence in accepting the shipment, and have not accepted goods known to be unfit for carriage and deliberately concealed that fact from the consignee.

In *Atlantic Shipping & Trading Co.* v. *Louis Dreyfus Co.*, Law Reports (1922), 2 Appeal Cases, 250, 260, House of Lords, Lord Sumner, delivering judgment, said:

> "Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case."

Lord Sumner further said:

> "In *Tattersall* v. *National Steamship Co.* (12 Q. B. D. 297), the words 'under no circumstances shall they be held liable for more than £5 for each of the animals' were held inapplicable to protect the shipowners from liability for the full value of animals lost by the ship's unseaworthiness, in spite of the apparently unrestricted generality of the words 'under no circumstances,' and in spite of the fact that they recognized liability up to £5 a head, and did not purport to exclude it altogether. That such words do not avail, where loss is due to unseaworthiness, was virtually recognized in *Baxter's Leather Co.* v. *Royal Steam Packet Co.* ((1908) 2 K. B. 626, 632) and held in *Wiener & Co.* v. *Wilsons, &c., Line* ((1910) 15 Com. Cas. 294)."

In *Tattersall* v. *The National Steamship Company, Limited* (1884), 12 Q. B. D., 300, 302 (Smith and Day, *JJ.*) Smith, *J.*, said:

> "I am of the same opinion. The real

question is what is the true meaning of a very special bill of lading relating to the carriage of certain cattle and other animals; and whether under that bill of lading the plaintiff can recover more than £5 damages in respect of each animal. It is admitted that the damage was occasioned by the negligence of the shipowner's servants before the voyage commenced in not properly cleansing and disinfecting the ship. There is unquestionably a duty on the part of the shipowner to have the ship reasonably fit for the carriage of the goods. The case of *Steel* v. *State Line Steamship Co.* conclusively so decides. Is there then anything in this bill of lading to exempt the defendants from what would *prima facie* be their liability in respect of the breach of this duty? I do not think there is. The terms of the bill of lading which have been alluded to appear to me to deal with the contract so far as it relates to the carriage of the goods upon the voyage; they do not in my opinion relate to anything before the commencement of the voyage. It was urged by the counsel for the defendants that the mention of 'stevedores' in the bill of lading shewed that the acts of servants of the defendants previous to the voyage were contemplated by the bill of lading. Now the stevedore no doubt is a landsman, but the reason why he is mentioned in this bill of lading obviously is because the mode of stowage of the cargo may very often be the cause of the damage which subsequently arises from sea perils during the voyage. I do not think that the mention of 'stevedores' as persons for whose negligence the defendants are not to be liable in any way advances the contention for the defendants. It seems to me that the true construction of the bill of

> lading is this: as the animals are going to be in the charge of the shipper's servants during the voyage it is agreed that the shipowners shall not be responsible for accidents, disease, or mortality; but it is not denied that this must mean, except accidents, disease or mortality occasioned by the negligence of the defendants' servants. Then it is further stipulated on behalf of the shipowners that 'under no circumstances' shall they be liable to a greater extent than £5 for each of the animals. I take the meaning of the whole to be that they are not to be liable for accidents, disease, or mortality arising during the voyage, unless occasioned by the negligence of their servants, and that even in respect of accidents, disease, or mortality so occasioned, they shall only be liable to the amount of £5. So construed the stipulation in no way restricts or affects the primary obligation of the shipowner to have the ship reasonably fit to receive the goods. On these grounds I agree that the judgment should be for the plaintiff."

Day, *J.*, delivered a concurring judgment.

Insofar as its relation to the bill of lading exceptions is concerned, the implied warranty of seaworthiness referred to in *Atlantic Shipping & Trading Co.* v. *Louis Dreyfus Co.* (*supra*) and in *Tattersall* v. *The National Steamship Company, Limited* (*supra*) is identical with the duty which this Court recognized in *Hannibal Railroad* v. *Swift*, 79 U. S. 262, 272, that "if objection existed on any of these grounds ['to the manner in which the property was packed'] or any other ground not concealed but open to the observation of the

company, it should have been stated before the property was received." And (79 U. S. 273) that "the common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure their safety."

In the case of *Northwestern Marble & Tile Company* v. *Joseph Williams*, 128 Minn. 514, the Court took occasion to review all of the authorities, and said:

> "The better and the more general rule seems to be that, if goods presented for carriage are not properly packed, and that fact is apparent to the carrier or his servants upon ordinary observation, then the carrier may refuse to receive the goods in that condition; but, if he does see fit to receive them, he assumes to carry them as they are and his full common law liability as carrier attaches to the contract of carriage. *McCarthy & Baldwin* v. *Louisville & A. R. Co.*, 102 Ala. 193; *Elgin, etc., R. Co.* v. *Bates Mfg. Co.*, 98 Ill. App. 311; *Elgin, etc., R. Co.* v. *Bates Mfg. Co.*, 200 Ill. 636; *The David and Caroline*, 5 Blatch. (U. S.) 268; *Klauber* v. *American Express Co.*, 21 Wis. 21; *Atlantic Coast Line R. Co.* v. *Rice*, 169 Ala. 265; *Hannibal R. Co.* v. *Swift*, 12 Wall. (U. S.) 262, 1 Moore Carriers, 559."

See also *Crawford* v. *Railway Co.*, 56 South Carolina, 136, 149.

In *Helliwell* v. *Grand Trunk Ry. of Canada*, 7 Fed. 68, 76, the Court said:

> "A carrier has no right to take a shipper's property for transportation, concealing from him at the time existing circum-

> stances within its knowledge, or within its fair and reasonable means of knowledge, and not within the knowledge of the shipper, that may incapacitate it for the full performance of its duty in the transportation of property, and then claim exemption from liability."

The doctrine of the *Dreyfus* case and of the *Tattersall* case, is that a carrier is not entitled to the benefit of exceptions unless he has provided a ship such as was in the contemplation of the parties at the time the goods were accepted. This doctrine may also be stated thus: Carriage must not be undertaken under circumstances not reasonably within the contemplation of the parties, and, if carriage is undertaken by a carrier under such circumstances, he cannot avail himself of the benefit of the exceptions against liability when the goods are damaged.

Expressed in another way, the rule announced in the *Dreyfus* and *Tattersall* cases is that a carrier is not entitled to the benefit of the bill of lading or common law exceptions unless he is, in fact, as able to carry the goods safely to destination without breakage or damage, as an ordinarily prudent cargo owner would assume from the carrier's holding himself out as a skillful and competent carrier of the particular goods which he accepts for carriage. (For a full discussion of this theory of a common ~~law~~ carrier's liability, see the essay on bailments in The Common Law, by Oliver Wendell Holmes, Jr.). Indeed, these doctrines would seem to be corollaries of the rule announced in *The Delaware,* 14 Wall. 579 (discussed in our principal brief at p. 47). There

this Court held that a contract of carriage which was silent as to whether goods were to be carried on deck or under deck imported a carriage under deck. In effect that case holds that, if there is an extraordinary circumstance which is material to the contract, and which is known to the carrier, he must disclose such circumstance in the bill of lading or lose the benefit of the exceptions. At page 598 this Court said:

> "Goods, though lost by perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the Act of God within the meaning of the maritime law, nor are such losses regarded as losses by perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; * * "

Here it appears that the apparent external leaky condition of the casks, when accepted for carriage, was the cause of the breakage. One of claimant's own witnesses, the foreman stevedore Richichi who discharged the cargo, testified:

> "No sir, what was broken was broken while we were working, because you could hardly move one of them without dragging it" (Record, p. 52).

Indeed, counsel for the claimant-respondent concedes at page 20 of his brief that none of the casks was damaged while on the *Mogador*, but that they were leaking while being loaded from

the *Mogador* on to the *Isla de Panay*. The insufficiency of the casks was manifest. The casks were leaking when they were accepted for carriage (Record, pp. 96, 97, 107, 122 and 129). The chief officer, the second officer, and the carpenter of the *Isla de Panay* all testified to this effect and that hoops fell off "from all over the casks" during loaded. The chief officer of the *Isla de Panay* also said:

> "In the first place, the carpenter is not a cooper. They need coopers for that. And, in the second place, if he did do that, to put all the hoops that came off, he would need at least eight or ten days" (Record, p. 108).

Indeed, at pages 18, 19 and 20, counsel for the claimant-respondent concedes that the casks were insufficient and were leaking.

The carpenter of the *Isla de Panay* testified that four hours after the *Isla de Panay* left Cadiz, the water in the bilges increased to twelve inches (Record, p. 126). Ordinary soundings would show only three to four inches (Record, p. 127).

This Court has held in *The Delaware* (*supra*), that, if a carrier accepts goods for carriage and conceals the fact that he intends to carry the goods on deck, he loses the benefit of the bill of lading and common law exceptions. Our position is that this claimant-respondent, by accepting for carriage casks which were obviously unfit for carriage, with full knowledge that the casks were leaking, and their ability to withstand ordinary handling being thereby impaired, and by conceding such facts from the consignee, thereby lost

the benefit of the bill of lading and common law exceptions against liability. This, as we understand it, is the position which the English courts took in the *Tattersall* and *Dreyfus* cases cited above.

For another reason this first point of claimant-respondent appears to be unsound. If the claimant-respondent really believed that the bill of lading or Harter Act exceptions applied to the present case, why did it not merely issue the bills of lading containing the exceptions without exacting in addition letters of indemnity from the shippers? The conduct of the ship's agent in exacting the letters of indemnity shows his belief that this was an abnormally bad case and therefore outside the bill of lading exceptions.

POINT II.

This Court should not overrule the decision in the *Higgins case*, 248 Fed. 386, that the ship is estopped from relying on insufficiency of package.

The Courts below went to great lengths in their opinions to distinguish the *Higgins* case from the present case on the ground that in that case the bill of lading recited that the goods had been shipped "in apparent good order and condition." In his brief in this court, however, counsel for the claimant-respondent being apparently persuaded that this distinction is unsound in view of the decisions of this Court quoted in our principal brief, assumes that the *Higgins* case and the present case are identical. Based on

this assumption counsel for the claimant-respondent asks this Court not to follow the rule announced in the *Higgins* case.

Such reliance by the claimant-respondent on a rule different from that announced in the *Higgins* case would at first blush seem to be inconsistent with the distinctions he draws later on (at pp. 40 and 41 of his brief under another point) between the *Higgins* case and the present case. It is significant, however, that only one (the second) of those distinctions was even mentioned by either Court below in the present case, notwithstanding they were also made in the claimant-respondent's brief below. The distinctions are clearly unsound. The first distinction that the bills of lading here merely named innocent consignees, instead of being drawn to "shipper or order" and then endorsed, was referred to by Judge Learned Hand in his opinion in the District Court in the *Higgins* case, 242 Fed. 568, 571, as follows:

> "The excuse that a bill of lading is not negotiable has no authority whatever, nor have any of the authorities cited any bearing on the case where a false statement is deliberately inserted to be acted upon by innocent third persons. To allow the ship to escape liability under such circumstances would be intolerable."

See in this connection pages 55 and 56 of our principal brief.

The third distinction on page 40 of claimant-respondent's brief is that "in that case the question of insufficiency of containers was not involved. The respondent there attempted to show

that the goods were actually damaged on shipment. Here no claim is made that the petitioners' olives were in a damaged condition when shipped. The claimant respondent simply contends that the casks were not strong enough to insure the safe carriage of their contents, if properly handled." Counsel for the claimant-respondent admits, however, on page 20 of his brief, that the casks "were leaking, many of them when transshipped aboard the *Isla de Panay* at Cadiz and some of their hoops dropped off." The chief officer, second officer and the carpenter of the *Isla de Panay* testified that the casks were leaking while being loaded on the *Isla de Panay* "the staves being somewhat apart" (Record, pp. 96, 97, 107, 122, 129). Under these circumstances it requires courage to say that the casks were not "in a damaged condition" when shipped.

The fourth distinction on page 41 of the petitioners' brief is, we think, conclusively answered on pages 14 to 18 of our principal brief.

The question involved in *Iron Mountain Railway* v. *Knight*, 122 U. S. 79, quoted at page 35 of the claimant-respondent's brief, was whether the bill of lading contained a warranty that the goods described should answer any particular quality not apparent to an ordinarily prudent shipmaster on observation of their external condition. This clearly appears from the opinion of the Court (122 U. S. 79, 85), where it is said:

> "It is not denied that the railroad company delivered to the plaintiffs below the whole number of bales of cotton mentioned in the bills of lading, with external marks thereon as called for, and that no change

> was made in the cotton or in the marking thereof after it was loaded on the cars for transportation at Texarkana, and that no damage or loss was occasioned by reason of any want of care or diligence in the transportation. The bill of lading contains no warranty that the goods described shall answer any particular quality; on the contrary, it expressly specifies that the contents of the packages are unknown. That a bill of lading in such cases does not operate as such a guaranty appears from the case of *Clark* v. *Barnwell*, 12 How. 272, where Mr. Justice Nelson, delivering the opinion of the court (p. 283), said: 'It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the cases,' * * *"

Furthermore, the Court in that case held that the relation of the carrier to the goods while the cotton was being compressed and before it was accepted for carriage, was not that of a carrier and shipper, but that "its liability as common carrier began only when specific lots were marked and designated at Texarkana, and specifically set apart to correspond with a bill of lading then or previously issued" (122 U. S. 79, 80). And at page 93 this Court further said:

> "No specific bales of cotton, as the property of the plaintiffs, separate from all others, were delivered to the defendant for them until the 525 bales in controversy were set apart and delivered to the defendant for immediate transportation on its cars; and prior to that time all cotton received in the warehouse to be compressed was received as the property of Potter,

> on his account, and subject, so far as grading, classifying, and marking were concerned, to his control, and none of it could be considered as having passed into the possession of the defendant as a common carrier for transportation until designated and set apart by Potter or his agents."

Indeed, this Court apparently assumed throughout its opinion in the *Iron Mountain* case that if incorrect marking of the goods was apparent to an ordinarily prudent carrier at the time of acceptance for carriage, the carrier would be liable to the consignee.

That the relation between the carrier and the owner of the goods is one of confidence has long been recognized. As early as the case of *Coggs* v. *Bernard*, 2 Lord Raymond, 909, Chief Justice Holt said:

> "The reasons for a carrier's liability are, first, because in such case a neglect is a deceit to the bailor."

This duty is imposed on the carrier partly because of his exclusive possession of another man's goods, and partly because he holds himself out to the public as specially skilled and able to carry goods safely. The libels in the present cases are for "cargo damage" (Record, p. 2), and allege that the ship failed to deliver the cargo in good condition. Counsel for the claimant-respondent has admitted (Claimant-Respondent's Brief, p. 20), that the casks "were leaking, many of them" and were in apparent bad condition, when received on board the *Isla de Panay*, and that the casks were broken during carriage by the *Isla de Panay*, and then relies, as an excuse, on the fact

that "THE CASKS WERE NOT STRONG ENOUGH TO INSURE THE SAFE CARRIAGE OF THEIR CONTENTS IF PROPERLY HANDLED" (Claimant-Respondent's Brief, p. 41), (Capitalization ours.) Even in the absence of a relation of confidence, it would seem that a carrier should, under such circumstances, be required, when issuing his bill of lading, to disclose to an innocent consignee this apparent unfitness of the casks to withstand the ordinary handling incident to carriage. In any event, the fact of unfitness for carriage should not excuse a carrier from a promise, made with knowledge of such unfitness, that it would carry the goods safely to destination.

CONCLUSION.

We respectfully submit that the decree below should be reversed with costs.

Respectfully submitted,

Dated, New York City, January 17, 1925.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

[redacted]

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Supreme Court of the United States

OCTOBER TERM, 1923.

No. .....

AUSTIN NICHOLS & COMPANY, EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners trading as E. Sanchez & Company, and E. TOLIBIA & COMPANY,
Petitioners,

against

Steamship ISLA DE PANAY; COMPANIA TRASATLANTICA,
Claimant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioners herein seek to have reviewed by a writ of *certiorari* the decision of the United States Circuit Court of Appeals for the Second Circuit, affirming the decrees of the District Court of the United States for the Southern District of New York, dismissing the libels herein.

The respondent herein, Compania Trasatlantica, appeared as claimant and owner of the steamship Isla de Panay in the courts below.

POINT I.

The claimant-respondent, Compania Trasatlantica, is not estopped from showing that the petitioners' casks were defective containers.

The petitioners, in support of their contention that the respondent is estopped from showing that the casks involved in the instant cases were improper containers, rely upon the case of *Higgins et al. v. Anglo-Algerian S. S. Co., Limited*, 248 Fed., 386, reversing the decision of the District Court reported in 242 Fed., 568.

The present cases have many features which distinguish them from the Anglo-Algerian case, namely:

1. In the Anglo-Algerian case the respondent alleged that the cargo, which consisted of dates, was damaged by rain before shipment on the steamer. The respondent in the instant cases does not contend that the petitioners' olives were in a damaged condition when shipped, but maintains that the containers in which they were carried were of insufficient strength.

2. In the Anglo-Algerian case there was a specific statement in the bill of lading that the goods were received in apparent good order and condition. The bills of lading herein contained no such statement. Nothing was said in them

one way or the other concerning the order and condition of the goods.

3. The casks here were, as a matter of fact, in apparent good order and condition when received for shipment by the respondent in Seville.

1. The present cases involve the question of defective containers. No such point was involved in the Anglo-Algerian case.

Disregarding the provision of the respondent's bills of lading, freeing it from responsibility for loss caused by defective containers (Clause 7, Record, pages 438, 439), the Harter Act itself absolves the respondent from liability where the loss is due to insufficiency of package. We cannot conceive of a cause where a carrier raises the plea of defective containers in which it would not affirmatively appear or irresistibly follow that the containers were deficient at the point of shipment. Insufficiency of package, as we understand it, necessarily means that the packages are constructed of materials of insufficient strength to insure the safe transportation of the merchandise contained in them. If this is so, the defects in practically all cases would exist at the time of shipment. It would be an unusual case indeed where the packages, although strong enough and sound when shipped, became inherently defective on the voyage. Defects of package would in most instances be fairly obvious when the goods were shipped, and yet we know of no decision holding that the carrier is precluded from showing the condition of the containers even though it must have been apparent from the start.

A leading case is that of *The Konigin Luise*, 185 Fed., 478, where a suit was brought to recover for

the leaked out portion of a consignment of 200 barrels of olive oil shipped from Smyrna to New York. The bill of lading contained an acknowledgment of receipt of the goods in good order and condition externally. The report of the decision of the District Court in 173 Fed., 811, shows (page 812) that the carrier raised the defense of insufficiency of package. The libellant also raised the question of estoppel, claiming to be a purchaser for value of a clean bill of lading. The District Court decided in favor of the libellant, and was reversed by the Circuit Court of Appeals, Second Circuit. The evidence showed that a large number of the barrels were found empty at New York, many of them having broken heads, loosened and missing hoops. Judge Lacombe, delivering the opinion, stated at the outset that although the barrels were in apparently good condition, they were not new barrels but a mixed lot of second hand barrels, some of them having patches on the staves. There was no proof of bad stowage or mishandling. The Court held that the carrier was exempt because the loss was due to breakage. Although the question of insufficient package was not specifically referred to by the Court, nevertheless that factor was involved in the case, and if the petitioners' contention is correct, the carrier should have noted on the bill of lading in the *Konigin Luise* case that the barrels were of inferior strength or be estopped for its failure to do so as against the libellant, a purchaser for value. Judge Adams in the lower court held, however, that the claimant and respondent were not estopped. This case, it is submitted, is a direct authority against the petitioners.

In *The Koranna,* 214 Fed., 172, the libellants sued for damage to a consignment of cocoanut oil pipes. The bill of lading acknowledged the receipt of the merchandise in apparent good order and condition.

Judge Hazel decided the case against the libellants solely on the ground of insufficient containers, and stated as follows at page 174:

> "There is much testimony in support of respondent's contention that the casks lacked strength and durability for so long a voyage. It is indisputable that the pipes of other shipments stowed in the same hold in the same way and subject to similar strains arrived in good condition, while libellants' casks were considerably damaged. Several coopers, who were witnesses, swore that the staves of the casks from which the oil leaked were old and rotted, and could easily be indented; also staves were found bearing score marks indicating repeated use. Three of the casks in question were inspected by the court on the sidewalk in front of the courthouse, and it was quite apparent that part of the staves were pressed in at the quarters and were old and tender to pressure, and that the bilges were impaired. It is quite true that cocoanut oil soaks into the wood and gives it a moldy appearance; but in the casks inspected by me the newer staves, which were easily distinguishable from the older ones, looked strong and lasting, while those that had evidently been previously used were decidedly weak and dilapidated, leaving the impression in my mind that the leakage was caused by improper

> cooperage in combining old and worn-out staves with new ones, thus producing casks which were unable to withstand the weight of their contents and the strains of the voyage."

The case of *The Orion,* 290 Fed., 379, is quite similar to the present ones. There the shipments consisted of barrels of olives and olive oil. The bills of lading acknowledged receipt of the packages without any reference to their order and condition, one way or the other. The respondent and claimant contended that the packages were old and weak and not sufficient containers for the carriage of olives and sulphur olive oil. The District Court held that the sulphur olive oil barrels were insufficient containers and dismissed the libels based upon the loss of that commodity. The oil leaked so badly from these barrels after they were received on board the Orion at Seville, that the Orion was obliged to pump large quantities of oil from the bilges before leaving port. If the Anglo-Algerian case had been considered applicable to such a state of facts, the carrier would have been held estopped from showing the insufficiency of the sulphur oil containers, for it was evident upon shipment that they were defective in strength. *The Orion* was a consolidated cause consisting of numerous suits brought in *rem* against the ship and in *personam* against her charterer.

2. Another very important feature distinguishing the Anglo-Algerian case from the present ones is that the bills of lading here (Claimant's Exhibit 2, Record, pages 437-443) contained no recital that the goods were received in apparent good order and condition as the bill of lading in the Anglo-

Algerian case did. There is no statement one way or the other concerning the condition of the merchandise. But, it is argued by the petitioners, the respondent is required by Section 4 of the Harter Act (7 U. S. Compiled Statutes, page 8587) to issue a bill of lading stating the apparent order and condition of the merchandise. The Harter Act, of course, applies to shipments between United States ports and foreign ports in either direction, but that does not mean that Congress has the power of regulating the issuance of a bill of lading in Spain, where these bills of lading were issued. Section 5 of the Harter Act (7 U. S. Compiled Statutes, page 8590) provides as follows:

> "For a violation of any of the provisions of this act, the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding $2,000."

The foregoing is the only penalty prescribed by the Harter Act for the issuance of a bill of lading which does not conform to the provisions of the Act. There is no penalty whereby a carrier, which has issued a bill of lading that is silent as to the order and condition of the goods, is automatically deprived of the benefits of the Act.

Passing by the absurdity of claiming that a person could be held subject to the penalty prescribed in the Act for an act done outside of the territorial jurisdiction of the United States, we call to the Court's attention that it is only in case of the refusal of the agent, owner or master of the vessel

to issue the bill of lading provided for in the Harter Act *on demand*, that the person so refusing becomes liable to the penalty prescribed. There is no proof of any such demand in these cases.

As bearing upon the sections of the Harter Act referred to, the case of *The Isola di Procida*, 124 Fed., 942, is in point. There a libel was filed in the Southern District of New York against the steamship Isola di Procida to recover damages for issuing a false bill of lading. The bill of lading was dated September 30th, 1901, on which date no merchandise had been received on the steamer. The goods in question were not received by the vessel until October 12th. Between the time when the brimstone should have arrived at New York if shipped according to the bill of lading, and the time when it actually did arrive, the price of brimstone had fallen, and the libellant who had paid the draft for the purchase price of the goods sued to recover the damage caused by the fall in the price of the merchandise.

Judge Holt, referring to Sections 4 and 5 of the Harter Act, stated as follows at page 944:

> "The true construction, in my opinion, of the provisions of the Harter Act in regard to bills of lading is that the rule previously established in the Federal courts that a false bill of lading is not binding on the owner or the ship still remains the law; but, if a false bill of lading is given, the person giving it is liable to a fine not exceeding $2,000, and the amount of that fine is made a lien on the vessel. But any damage caused by the falsehood does not create any lien on the ship. The true remedy

> of the party injured in such a case is an action against the person who actually issued the false bill of lading."

The libel against the ship was dismissed.

We are dealing in this record purely with facts and the fact is that the respondent made no representation to the petitioners that these goods were in apparent good order and condition when received for shipment.

The petitioners attach importance to the fact that the respondent received from the shippers so-called letters of guaranty, whereby the shippers agreed to hold the respondent harmless in case any damage should result from insufficiency of the packages (Claimant's Exhibits 13, 14 and 15; Record, pages 449-451). It is questionable, in the first place, whether these letters, all of them, constitute real guaranties, but assuming that they do, what have they to do with the question of estoppel? It is true that guaranties were referred to by the Court in its decision in the Anglo-Algerian case, but an examination of the decisions of the District and Circuit Courts will show that the giving of the guaranties was not the decisive point in the case at all. How can they possibly constitute an element of estoppel? An estoppel is created by representations by one person to another, on which the other relies to his detriment. The present petitioners never saw these so-called guaranties. Whatever representations they saw were contained in the bills of lading.

Equitable estoppel is defined in 21 Corpus Juris, page 1113, Section 116, as follows:

> "1. Estoppel by misrepresentation, or equitable estoppel, is defined as the effect of

> the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained."

The essential elements of an estoppel are wanting in these cases.

There is no provision in the Harter Act making it incumbent upon a carrier, as a condition of exemption from liability for loss due to insufficient packages, to make any notations on the bills of lading that the packages are insufficient. The obligations imposed upon the carrier are enumerated in the Act and this is not one of them.

The respondent also has an exemption against "fragile containers" in Clause 7 of its bill of lading (Record, pages 438, 439), which it has pleaded as a defense in its answer (Record, page 26).

3. Although the bills of lading contained no recital of that fact, the casks were actually in apparent good order and condition when received at Seville. By this we mean that the casks, while old ones and made of inferior material, were not damaged and broken when received on board the Mogador at Seville, for the shippers' coopers had been working on them while they were lying on the quay before shipment, tightening the hoops and the staves, replacing missing hoops with others, and stopping any leakages.

Captain Pastrana of the Mogador testified that brine was leaking from the casks on the quay at Seville, but that the coopers of the shippers had repaired the casks before they were loaded, which stopped the leakage for the time being (Record, pages 275, 276). He also testified that the coopers inserted paper in the joints between the staves and tightened the hoops; also that the casks were not broken at Seville, but that some of their hoops were broken, in place of which hoops others were substituted before the casks were stowed on the Mogador (pages 289-291). The captain further testified that no casks were broken when loaded aboard the Mogador (pages 291-293); that no leaky casks were loaded into the hold of the Mogador, but that they were left on deck and the shippers' coopers repaired the leakage (pages 293-295); also that none of the olives spilled out while the casks were being loaded at Seville (page 306).

Captain Pastrana is supported in this testimony by Diego Garcia, the foreman stevedore at Seville (pages 321, 322, 347, 348); Jose Montiel, the boatswain of the Mogador (pages 348, 349); Mariano Santacana (pages 385, 386, 393), and Manuel Samano (pages 387, 388, 392, 393).

It is evident from the foregoing testimony that the casks were not broken and leaking when taken aboard the Mogador at Seville. They afterwards broke and loosened up simply because they were not strong enough containers both in material and construction.

An extension of the rule laid down in the case of *Higgins et al.* v. *Anglo-Algerian S. S. Co., Limited, supra,* to cases involving defenses of insufficiency of package under the Harter Act would mean that a carrier could never succeed in the defense of defective packages, which is now permitted by the Harter Act, unless in each instance notations were made on the bills of lading that the containers were insufficient.

As previously stated, the defects which would render packages deficient in strength are usually patent and not latent defects. In other words, the carrier can usually see, at the time when the goods are shipped, whether the barrels are old or new, whether they contain old or patched staves mixed with new ones or whether the wood in crates or other packages is too thin.

The statement at the beginning of the petition for a writ of *certiorari* that the questions presented for review were decided contrary to the decisions of this Court and of the Circuit Courts of Appeals of other circuits is misleading, to say the least. The precise question presented herein is whether a carrier which receives for shipment apparently defective containers and issues a bill of lading therefor, which states nothing one way or the other about their condition, is estopped as against an innocent purchaser of the bill of lading from proving the containers insufficient. This question has never been previously presented to any court in the United States.

POINT II.

The decision of the Circuit Court of Appeals covers actions in personam and in rem alike and turns upon the absence of a recital in the bills of lading that the goods were in apparent good order on shipment. The fact that the present suits happen to be in rem is therefore immaterial.

The petitioners apparently are basing this application almost entirely upon the holding of the Circuit Court of Appeals that no suit in *rem* could be maintained under the circumstances of the present cases. A reference to the concluding paragraph of the opinion of the lower court will show that the Court recognized the fundamental distinction between *Higgins et al.* v. *Anglo-Algerian S. S. Co., Limited, supra*, and the present cases because of the acknowledgment in the bill of lading in the former case of the receipt of the goods in apparent good order and condition, which recital is lacking in the bills of lading involved in the present suits.

The lower court, in the paragraph referred to, stated as follows:

> "In the Higgins case the bills of lading recited that the shipments had been received in good condition. In the instant cases the bills of lading contain no representation as to their condition one way or the other, and the distinction is vital."

It is quite clear therefore that the decision of the Circuit Court of Appeals would have been the

same even if the suits had been begun in *personam* against the respondent herein. In other words the fact that the libels herein were in *rem* against the ship is not the actual turning point of the decision. Undue emphasis has therefore been laid by the petitioners upon the references in the lower court's opinion to the non-liability of the ship to the petitioners.

POINT III.

The petition for a writ of certiorari should be denied.

Dated, October 19, 1923.

Respectfully submitted,

JOHN W. CRANDALL,
Counsel for Compania Trasatlantica,
Claimant-Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1924.

AUSTIN NICHOLS & COMPANY, Petitioner, against THE STEAMSHIP ISLA DE PANAY, COMPANIA TRASATLANTICA, Claimant-Respondent.	No. 199.
EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners, trading as E. Sanchez & Company, Petitioners, against THE SAME.	No. 200.
E. TOLIBIA & COMPANY, Petitioner, against THE SAME.	No. 201.

BRIEF ON BEHALF OF THE CLAIMANT-RESPONDENT.

Statement of Facts.

These are three writs of certiorari to three decrees of the United States Circuit Court of Appeals for the Second Circuit, affirming decrees

of the United States District Court for the Southern District of New York dismissing the libels of the petitioners against the Spanish Steamship Isla de Panay.

The petitioners filed separate libels against the Isla de Panay, claiming damage to certain consignments of olives carried by the Isla de Panay from Cadiz, Spain, to the port of New York on her voyage ending November 20, 1917 (pp. 2-20). (Note: All page references unless otherwise designated, refer to the record herein.) The Compania Trasatlantica, owner of the vessel, was not joined in the suits and therefore appears only as claimant of the vessel. (In this brief the parties will be referred to throughout as the petitioners and the claimant-respondent respectively.)

The petitioners' olives were shipped at Seville, Spain, on the Steamship Mogador, a small river boat also owned by the Compania Trasatlantica. From Seville they were transported down the Guadalquiver River to Cadiz, Spain, and there transhipped aboard the Isla de Panay (p. 74, fol. 142). The Mogador experienced good weather (p. 191, fol. 369). Sixty-nine casks were taken from Seville to Cadiz by rail (p. 155, fols. 282, 283). The bills of lading were issued in Seville (p. 82, fol. 156).

The damage to the casks was due to breakage, which was within the exemptions of the claimant-respondent's bills of lading (p. 11, fol. 26). The claimant-respondent also contended that the petitioners' casks were improper containers (p. 11, fol. 26, p. 13, fol. 30). (Note: As all of the answers to the libels are substantially the same, only one will be referred to.)

The three actions were tried together. The peti-

tioners offered no evidence of negligent stowage. It was conceded in fact by the petitioners' surveyors that the stowage was proper. Furthermore, practically no evidence was offered as to any negligent handling of the casks.

The principal contention of the petitioners at the trial was that the insufficient strength of the casks must have been apparent to the claimant-respondent's representatives at Seville; that therefore a notation of such insufficiency should have been made upon the bills of lading, and that the claimant-respondent, by issuing and delivering bills of lading containing no such notation, in consideration of so-called guaranties of the shippers to hold it harmless if any damage resulted to the goods while in transit, had committed a fraud upon the petitioners who were alleged to be innocent holders of the bills of lading for value. The petitioners accordingly argued that the carrier was estopped from raising the defense that the containers were insufficient in strength.

The District Court, finding no evidence of bad stowage or improper handling on the part of the claimant-respondent, held that the casks were insufficient containers, and that the claimant-respondent was not estopped from showing this fact. The three libels were accordingly dismissed (pp. 222-225).

The petitioners thereupon appealed to the United States Circuit Court of Appeals for the Second Circuit which affirmed the decrees of the District Court (pp. 231-242). (See: *The Isla de Panay*, 292 Fed., 723.) The petitioners then filed a petition for writs of certiorari to review the decrees of the Circuit Court of Appeals, which petition was granted on November 12, 1923, by this Court (p. 244).

Although the stowage and handling of the cargo were proper in all respects, the petitioners have not formally conceded this. We have therefore covered the subject in Point I. In Point II the insufficiency of the containers is discussed. We have done this principally with the idea of furnishing to the Court as brief a resumé as possible of the evidence showing the fragility of the casks.

The real questions before this Court, which are considered in Points III and IV, arise out of the petitioners' allegations of fraud on the part of the carrier in the issuance of the bills of lading.

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals referred to the fact that the bills of lading issued for the casks of olives were issued at Seville, Spain, by the captain of the Mogador and not by the captain of the Isla de Panay at Cadiz, the transhipment point. The Court held that the casks, which were constructed of chestnut instead of oak, were not proper containers for olives; that the stowage of the casks was proper; that there was no evidence of negligent handling by the ship; that the casks were broken and that therefore the ship was exempted from liability by the breakage clause of the bills of lading.

As regards the petitioners' claim of estoppel, the Court decided as follows: That bills of lading have a dual character, being both contracts and acknowledgments of the receipt of the goods shipped, and that as receipts they may be contradicted by parol evidence; that the bills of lading in question did not need to be contradicted as they made no mention of the condition of the casks when re-

ceived; that the bills of lading were straight bills of lading within the terms of the act of August 29, 1916, known as the Bills of Lading Act, because the goods were consigned to specific persons, and that pursuant to Section 29 of the Act a straight bill of lading cannot be negotiated free from existing equities; that where the consignee of a straight bill of lading pays the consignor for the goods before receiving them, or directs payment through his bankers on the presentation of a clean bill of lading, he makes such payment at his own risk, and if the goods prove to be damaged he cannot hold the ship except on proof of negligence. The Court pointed out that the so-called letters of guaranty were not addressed to the Isla de Panay or to her master, but to the Compania Trasatlantica at Seville, and that inasmuch as neither the captain nor any officer of the Isla de Panay saw these letters or had anything to do with them, no liability could be imposed upon the ship in rem.

The Court then referred to the provisions of the Harter Act, making it incumbent upon an owner or a master or agent of a vessel to issue a bill of lading stating among other things the apparent order and condition of the merchandise received, and observed that before the passage of the Harter Act a bill of lading which made no representation one way or the other as to the condition of the goods would not operate as an estoppel against the shipowner to deny that the goods were in proper containers. The Harter Act was held not to have made a difference in this respect, inasmuch as the only penalty therein prescribed for failure to issue the required bill of lading on demand is a fine not exceeding $2,000. It was held that there was no estoppel.

POINT I.

The Circuit Court of Appeals correctly held that the petitioners were not entitled to a recovery against the steamship Isla de Panay, because the damage to the merchandise came within the exemptions of the bills of lading issued for the goods and the petitioners totally failed to prove negligence on the part of the ship or the claimant-respondent.

Clause 7 of the claimant-respondent's bill of lading provides as follows (p. 216, fols. 438, 439):

> "Also not responsible for * * * breakage of the articles * * *."

That the casks were broken is undisputed. The petitioners' witness, Sagredo, testified on cross-examination as follows (p. 23, fols. 54, 55):

> "Q. Do you admit that the casks themselves were weak? A. I couldn't tell you, because when I saw them they were all broken up. * * *
>
> Q. What seemed to be the matter with the casks? A. Well, all the staves were broken; some of them; not all. I had a shipment of 100 casks. Of course the brine ran out and if brine runs out olives lose their flavor and color and are not fit to eat."

Charles A. Thayer the Department Manager of Austin Nichols & Co., one of the petitioners, testified (p. 27, fols. 60, 61):

"Q. Did you examine these goods on the dock? A. Yes.

Q. What condition did you find? A. A great many of the casks were without brine. Some of the casks were entirely broken and when tendered to us by the Steamship Company were like bundles of staves and heads. The staves in a good many of the casks were cracked and broken which allowed the brine to leak off and on that account the olives had deteriorated.

Q. Some of the staves were actually broken? A. Broken, sappy.

Q. Did you see any of the casks that were not broken? A. Yes.

Q. In what condition were they? A. Sound; full of brine, and the contents were satisfactory."

Fred C. Rodman, the petitioners' surveyor, testified (p. 30, fol. 66):

"Q. Were the casks intact or were they broken? A. They were broken."

Collins Chivers, a cooper called by the petitioners, testified (p. 39, fol. 82):

"Q. Did you look down into the hold? A. Oh, yes.

Q. What did you see when you looked down? A. Well, I couldn't just mention the holds; I didn't take any notice—that is, the number of the hatches.

Q. You mean which hold it was? A. Yes, sir, but what I noticed was that the casks generally were in a bad condition.

Q. In what way? A. Some of the casks were broken.

Q. How were they broken? In what way? What was the nature of the break? A. There were broken staves and so on, broken chimes."

It is needless to multiply citations of testimony. The testimony of the claimant-respondent's witnesses also establishes that the casks broke.

Under these circumstances the burden of proof rested with the petitioners to show that the carrier was guilty of negligence in the stowing and handling of the olives. There is not a scintilla of evidence in the record showing negligent stowage of these consignments of olives. The petitioners did not produce a single witness, expert or otherwise, to establish negligence in this respect. Their counsel did not even argue the point at the trial.

The claimant-respondent, on the other hand, produced affirmative proof of good stowage, both on the Mogador and on the Isla de Panay.

We shall describe as briefly as possible the stowage on both vessels.

The port of Seville, Spain, is but a short run up the Guadalquiver River from Cadiz, the trip from Seville to Cadiz consuming only 8 or 9 hours (p. 166, fol. 308). The casks were loaded on the Mogador directly from the wharf at Seville, one by one in slings (p. 172, fol. 323). The Mogador is a small river steamer with two holds and two hatches, and 200 of the casks were stowed in her holds and 85 on deck (p. 162, fols. 298, 299; pp. 170, 171, fol. 319; p. 174, fol. 326; p. 173, fol. 325). The casks were stowed two tiers high, and in the after part of the forward hold about 20 or 30 casks were stowed over the other two tiers. No

cargo was stowed above the olives. All casks were stowed with bungs up and with quoins underneath to prevent the bilges touching the floor. The stowage was bilge and cuntline, or one on four, with chocks and quoins between all of the casks (pp. 162, 163, fols. 299-302; pp. 172, 173, fols. 323-325).

Upon arrival of the Mogador at Cadiz, the casks, according to the testimony of the witnesses taken under commission in Seville, were transhipped directly aboard the Isla de Panay (pp. 173, 174, fols. 325, 326).

The testimony also is that no damage was sustained by the casks while they were aboard the Mogador (p. 154, fol. 281; p. 174, fols. 326, 327; p. 179, fol. 341), and also that the 69 casks which were transported by rail arrived at Cadiz in the same condition as when they left Seville (p. 175, fol. 329).

The steamship Isla de Panay is a vessel of 3,484 gross and 2,087 net tons (p. 73, fol. 141). She is divided up into four compartments, the No. 1 hold being 59 feet long and 39 feet wide; No. 2 hold 62 feet long and 41 feet wide; No. 3 hold 44 feet long and 40 feet wide with 8 feet of allowance for fan or tunnel recess; No. 4 hold 72 feet long and 39 feet wide with 26 feet of allowance for fan or tunnel recess. Besides her lower holds she has upper and lower 'tween decks separated as just stated (pp. 91, 92, fol. 173; p. 73, fol. 141). The distance from the floor of the lower hold to the lower 'tween decks is 13 feet, and the distance from the top of the tunnel recess to the lower 'tween decks is 5 feet (p. 92, fol. 173). The above were the measurements of the various compartments and parts of the vessel on the particular voyage.

A combination diagram and stowage plan of the

ship is contained in Claimant's Exhibit 12, side folio 448, following page 220.

Practically all of the olives were stowed in lower holds Nos. 1, 2, 3 and 4. All of the casks were stowed with their bungs up and their bilges clear of the floor of the holds. The casks of olives, which were approximately 5 feet in length and 4 feet in diameter at the bilge, and weighed about 750 kilos each, were stowed two tiers high, bilge and cuntline, through the four holds, with the necessary wedges and quoins between all of the casks. In holds Nos. 1 and 2 the casks were stowed straight across the holds, while in holds Nos. 3 and 4 they were stowed on each side of the shaft tunnel.

The casks of olives occupied the height of about 9 feet in the lower holds, and on top of them were stowed small barrels of wine about ¼ or ⅙ of the size of the olive casks, as well as cases of wine and cases of chestnuts. Cargo battens were fastened to the frames of the ship and any empty spaces around the casks were filled in with small cargo or dunnage wood. One tier of olive casks was also stowed on top of the fan or tunnel recess, at the after end of the No. 4 hold, quoined and chocked as stated, with a few bags of chestnuts stowed over the casks. The space forward of the olives stowed on the fan was completely filled with cargo.

In addition to the casks which were stowed in the lower holds of the vessel, olive casks were stowed one tier high in the square of the hatchways Nos. 1, 2 and 3 in the upper 'tween decks, bungs up, and properly quoined and dunnaged. These casks in the upper 'tween decks were entirely surrounded by cargo, and above them were stowed bags and cases of chestnuts (p. 91, fol. 173; p. 96, fol. 180; p. 103, fol. 192—p. 108, fol. 199).

For a more detailed description of the stowage see the claimant-respondent's hypothetical question (pp. 64, 65).

A hypothetical question based upon the foregoing evidence was put to Captain Noel P. Pilcher, an expert for the claimant-respondent, and answered, as follows (p. 65, fol. 125):

> "Q. What is your opinion as to whether or not the stowage of the casks of olives as I have stated to you was the usual and customary method of stowing olives in the trans-Atlantic trade, and whether or not such stowage was proper? * * * A. Such stowage as you describe was customary and proper."

The same question was also put to Captain Walter G. Cocks, a surveyor of large experience at the port of New York and his testimony was as follows (p. 70, fol. 135):

> "Q. What can you state as to whether or not the stowage mentioned in that hypothetical question was proper stowage, and whether or not it is the usual and customary method of stowing olives? * * * A. It is excellent stowage. It is rather better than usual."

In this connection may we call to the attention of the Court the following statement, in paragraph 2 of the reports submitted by the surveyors for the cargo underwriters (Libellants' Exhibits 1 and 2, following page 214):

> "The casks were apparently well stowed, being tiered only two high."

There is practically no evidence as to any improper handling of the cargo. The petitioners produced one witness, Rodman, who said that the stevedores had crushed the casks in the squares of the hatches by letting down suddenly upon them slings of lemons, onions and chestnuts, and had dragged these sling loads from the after part of the hold over to the square of the hatch across the casks, thus loosening their hoops (p. 30, fol. 66; p. 31, fol. 68). Taking the testimony of this witness at its face value it is apparent that it is worthless from the petitioners' point of view. In the first place the witness admitted (pp. 35, 36, fol. 76) that he did not see any casks damaged by sling loads let down upon them, but that he was giving simply his own conclusions in that regard. Furthermore, according to Rodman himself, if the crates were dragged over the casks, as he concluded, they would only touch three or four casks at most (p. 34, fol. 73). The absurdity of the assertion that these sling loads loosened the hoops of the casks, assuming that they were dragged over the casks, is apparent when it is recollected that casks curve outward from their ends to their bilges. It would therefore be a physical impossibility to drag the slings of merchandise over the casks in such a manner as to loosen their hoops, for the slings would only touch the highest points of the casks.

Rodman's testimony, however, is absolutely contradicted by the stevedores who discharged the olives. In the first place, slings of cargo were not dragged over the casks to the square of the hatch. Where cases of merchandise were to be discharged, a platform sling would be placed in the square of the hatch and the cases would be passed from hand

to hand from their places in the stowage to the hatchway (p. 49, fols. 99-100; p. 56, fol. 110; p. 62, fol. 120). If it was ever necessary to bring out cargo in any other way, skids were invariably used (p. 50, fol. 100). According to the stevedores, it was utterly impracticable to place the cases on a platform sling and then drag the sling over to the hatchway (pp. 50, 51, fol. 101; p. 56, fol. 110; p. 62, fol. 120). In a case where the stevedores were obliged to get any of the small wine barrels over to the square of the hatch, they always rolled them on skids. It was infinitely easier to get them out in this manner than to roll them over the tops of the olive casks (p. 53, fol. 106; p. 62, fol. 119).

The three stevedores examined on behalf of the claimant-respondent denied that any slings of cargo were raised up and let down again on the casks in the square of the hatch (p. 49, fol. 99; p. 56, fol. 110; p. 62, fol. 119).

Captain Pilcher, the claimant-respondent's witness, testified that if these casks had been sound containers, the letting down of a sling containing crates of onions and chestnuts on them would not have any effect on them (p. 67, fols. 128, 129); and he further testified on cross examination as follows (p. 67, fol. 129):

> "Q. Do you think no precautions are necessary with good, strong oak casks of olives; hitting them with cargo as has been testified would not have any effect? You said no damage would be done by hitting these casks with cargo? A. If as described by Mr. Rodman where they were not dumped down on them and there would be a pressure brought to bear for a short time, it would not have any material effect upon good, sound containers. It

> would have, if you dropped 8 packages down the hatchway on top of them. It would break them."

Rodman testified that the crates of merchandise in slings were not dropped down on the casks, but let down on them.

The District Court took the same view of the discharging that Captain Pilcher did, and held that there was no evidence of any handling of the cargo by the stevedores which would cause damage, had the casks been proper containers (p. 122, fol. 455). The Circuit Court of Appeals also found no evidence of improper handling.

It has been held so often that the cargo owners assume the burden of proving negligence when the damage falls within a valid bill of lading exemption, that we shall refer briefly to but a few of the authorities.

Clark v. *Barnwell*, 12 Howard, 272, 19 Dec. of Sup. Ct., 130, is the most frequently cited case on the subject. There Mr. Justice Nelson said (p. 132):

> "For, as the masters and owners, like other common carriers, may be answerable for the goods, although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which, either according to the general rules of law, or the particular stipulations of the parties, afford an excuse for the non-performance of

the contract. After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence, and inattention to his duty. Hence it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him."

In *The Henry B. Hyde,* 90 Fed., 114 (C. C. A., Ninth Circuit), the owners of cargo libelled the Henry B. Hyde for damage to certain goods caused by breakage. No evidence was produced by either side to show what caused the breakage. The bills of lading contained an exemption against breakage.

A decree dismissing the libel was affirmed by the Circuit Court of Appeals. Judge Gilbert delivered the opinion and stated at page 115:

"In the present case, no question arose concerning the nature of the damage that had

been sustained. The loss was wholly from breakage. It is so alleged in the libel. The ship was not accountable for breakage. There was nothing, therefore, for the carrier to prove in order to place the loss within the clause which excepted liability. In this respect the case differs from some of those which are cited by the appellants, such as cases where the carrier had stipulated against loss by the perils of the sea. The Giava, 56 Fed., 243; The Warren Adams, 20 C. C. A., 486, 74 Fed., 413. In such a case, the duty rests upon the carrier to show that the damage resulted from the perils of the sea. In the present case, the stipulation was explicit. The nature of the injury indicated for itself that it belonged within the specified exemption from liability. The burden of proof therefore, rested upon the libellants to establish by the evidence that the breakage occurred through the negligence of the ship's employes. No evidence having been offered to the court to prove such negligence, we find no error in the decree dismissing the libel. The decree will be affirmed."

It is not necessary for the carrier to show how the breakage occurred.

In *The Patria,* 132 Fed., 971 (C. C. A., Second Circuit), Judge Lacombe, discussing the exemption in the bill of lading against breakage, stated, at page 972:

"* * * but if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken —although the libellant may show that negligence of those on the ship, or of those who

stowed her or discharged her, caused the break, and, showing that, may recover."

See also:

The Lennox, 90 Fed., 308 (S. D., N. Y.).

It makes no difference whether the cargo owner or the carrier proves damage which falls within the exemptions of the bill of lading. It is sufficient if such fact appears in the record.

In *The J. L. Luckenbach,* 209 Fed., 142 (D. C. N. D., CAL.), the libellant's goods were received in a badly damaged condition caused by breakage and rust. There was no proof as to how the breakage occurred. The Court dismissed the libel and stated, at page 142:

"All of the damage shown, having been occasioned by breakage or rust, comes within the exemption in the bill of lading, and libellant cannot recover therefor, without proof that the breakage and rust were due to the negligence of claimant or his agents. Once it is shown that the damage arose from one of the excepted causes, whether this proof is made by libellant or by claimant, the burden is then upon the shipper to establish that the negligence of the carrier takes the case out of the exception. No such proof was presented here; the libellant being content to rest upon proof of breakage and rust from water. Neither of these shows any negligence on the part of the carrier."

The fact that an unusually large amount of damage may have been sustained by the cargo owners does not justify any inference of negligence on the part of the carrier.

In *The Arpillao,* 270 Fed., 426 (C. C. A., Second Circuit) (certiorari denied 255 U. S., 574), the Court said (p. 427):

> "We adhere to rulings of which the most frequently quoted is The St. Quentin, 162 Fed., 883, 89 C. C. A., 573 (and see also The Good Hope, 197 Fed., 149, 116 C. C. A., 573, and cases cited), to the effect that where the cause of cargo loss is covered by a valid exception, mere excessive or unusual loss is not in and of itself sufficient to establish a prima facie case of negligence against the carrier."

See also, on this point:

The Claverburn, 147 Fed., 850 (S. D., N. Y.);
The Neidenfels, 174 Fed., 293 (S. D., N. Y.).

The damage came squarely within the exemptions of the bills of lading, and the petitioners, having failed to meet the burden of proving negligence, were clearly not entitled to recover.

POINT II.

The petitioners' casks were of insufficient strength for the carriage of olives. The Isla de Panay is therefore exempt from liability both under the Harter Act and the exceptions of the bills of lading.

The Act of Congress of February 13, 1893, c. 105, 7 U. S. Compiled Statutes, p. 8573) commonly known as the Harter Act, provides that if the owner

of any vessel transporting merchandise or property to or from any port of the United States of America shall exercise due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel nor her owner shall be held responsible for damage or loss resulting from acts or omissions of the shipper of the goods and from insufficiency of package.

This Act was pleaded by the claimant-respondent (pp. 7, 13, 19).

Clause 7 of the claimant-respondent's bill of lading provides in part as follows (p. 216, fols. 438, 439):

> "Also not responsible for * * * breakage of the articles and fragile containers."

The claimant-respondent relied upon this clause in subdivision III of Article 7 in its answers (p. 5, fol. 11).

No claim was made by the petitioners that the Isla de Panay was unseaworthy. The evidence shows that she was a perfectly seaworthy vessel and properly manned, equipped and supplied at the beginning of the voyage in question. The trouble lay with the petitioners' casks, which were entirely insufficient for the carriage of olives. The claimant-respondent produced a large amount of evidence in support of this defense and the petitioners offered practically no evidence to contradict it, apparently relying upon their claim of an estoppel.

The claimant-respondent's evidence shows that the casks were made of chestnut wood instead of oak; that the staves were worn, the hoops rusty and thin, and the heads warped (pp. 155, 156, fols. 283-285; p. 158, fol. 289; p. 160, fol. 296; p. 176, fol. 333; p. 177, fol. 336). It is admitted that the wood in the casks was chestnut (p. 41, fol. 85). The ship-

pers had a gang of coopers working on the casks on the quay at Seville before they were shipped on the Mogador. They were tightening the hoops, inserting paper between the staves, replacing broken hoops and generally repairing them (pp. 151, 152, fols. 275, 276; pp. 158, 159, fols. 289-293).

The shippers' coopers succeeded in getting the casks repaired so that they were not leaking when they were taken aboard the Mogador (pp. 159, 160, fols. 293-295).

The officers of the Isla de Panay corroborated the testimony of the witnesses who were examined in Seville as to the condition of the containers. Captain Muslera of the Isla de Panay testified that these were the oldest casks that he had ever carried (p. 80, fol. 152; p. 81, fol. 155). The casks, although handled carefully while on the Mogador, and having suffered no damage while on that steamer, were leaking, many of them, when transhipped aboard the Isla de Panay at Cadiz, and some of their hoops dropped off (pp. 77-79, fols. 148-151; pp. 96, 97, fols. 180-182; p. 122, fols. 222, 223). Although the Isla de Panay did not encounter extraordinarily rough weather on her voyage, the wind never getting above 6 or 7 on the Beaufort scale (pp. 97, 98, fols. 182, 183) the soundings of her bilges soon after she left Cadiz, indicated the presence of olive brine (pp. 121, 122, fols. 221, 222; pp. 133-135, fols. 241-243; pp. 135, 136, fols. 244, 245).

At times the liquid would increase in the bilges to the depth of 15 to 17 inches (p. 121, fol. 221; pp. 124, 125, fols. 226, 227), although ordinarily the ship would have but a few inches in her bilges (p. 121, fol. 221).

Upon the ship's arrival at New York, the casks

were all in place in the stowage (p. 48, fol. 98), but when the stevedores attempted to handle them, the trouble commenced. The hoops broke off, and as soon as this happened the heads would come out (pp. 47, 48, fols. 96, 97; p. 52, fol. 104; pp. 55, 56, fol. 109; p. 61, fol. 117).

The casks which looked strong enough to roll to their allotted places on the pier were rolled, as is the customary practice (pp. 48, 49, fol. 98; p. 56, fol. 110; pp. 56, 57, fols. 111, 112; pp. 70, 71, fols. 135, 136), but in a great many instances these casks, which appeared sound, would fall to pieces when the stevedores would roll them (p. 56, fol. 110). In cases where the casks looked bad they were placed on wheel trucks and wheeled away from the ship and then rolled off from the trucks on to the pier on skids (pp. 48, 49, fols. 98, 99; p. 56, fols. 109, 110).

Captain Pilcher, one of the claimant-respondent's experts, a man of unusual qualifications (p. 63), testified with regard to the sufficiency of chestnut wood for olive casks, as follows (p. 66, fols. 127, 128):

> "Q. Are you familiar with the advantage or disadvantages of oak, chestnut, and other woods for olive casks? A. Yes.
>
> Q. What experience have you had with regard to observing different kinds of wood for olives? A. During the past six years in the Port of New York I have examined many thousands of casks, both of oak and chestnut wood and have gone to a considerable amount of trouble in making special surveys and reports to steamship companies concerning the examination. In 1919, the chestnut wood casks were coming in in such condition from Spain and

Italy with olives alone that we brought the attention in circular form to different ship owners and showed them as comparison the result of chestnut wood as compared with oak.

Q. Based upon your own observation? A. Absolutely, on special surveys, under my own observation.

Q. Based upon your own observation of the containers in which olives came in, will you tell us what are the relative merits of oak and chestnut for olive containers? A. My experience of oak containers has been that the results are good. The containers come here in fair condition and their contents are usually intact. With chestnut wood we invariably have some heavy leakage, whether it is the olive in brine or whether it is oil. The olives in brine, or the brine itself, causes the chestnut wood—which is softer than oak and more brittle—to become soggy. When it gets soggy and saturated the staves crack and when they are cracked you can see the saturation of the staves right through the staves. Also in carrying olives one must always consider the contents and that the hoops will rust. When the hoops get so rusted through the edge of the containers they burst and then the staves open; even though the heads do not come out the leakage of brine takes place; I would say that the chestnut wood containers would not compare with the oak containers for the carrying of oil or brine or any similar commodity.

Q. How long have the chestnut containers been used for olives? A. From experience I cannot say until 1916; but my experience on the Spanish coast, where I was for six months, showed me that it was the custom in Spain to

import oak in staves from this country and from Great Britain to make these containers. Since the war as a result of war conditions, and not being able to get the imported wood, they made them of chestnut. That applies to the olive oil also."

Captain Cocks, also an expert of wide experience (p. 70), testified that trouble is experienced generally with chestnut casks at New York (p. 70, fol. 135). Captain Cocks also testified on cross examination as follows (p. 71, fol. 137):

"Q. Then assuming the suggestions that I made bearing in mind that these same casks had two weeks before received all the handling that they had received in the small steamer and going into the large steamer, and had sprung no leaks and that on arriving at New York the casks were unbroken, you would naturally expect that they could be delivered alongside of the ship in fair condition? A. Am I advised that there had been leakage on the way?

Q. Yes. A. Then there would be a number of hoops slack, undoubtedly.

Q. Captain Pilcher thought that that would not make any difference? A. Well, I have noticed that it has where we have a big leakage of brine in the casks which we see in stow, they would invariably get slack.

Q. That would tend to open up the staves and make the— A. The staves would have to open up, but of course to allow leakage."

Previous to the war, olive casks were made of oak, but during the war, apparently owing to the scarcity of oak, they were made of chestnut, an ad-

mittedly inferior material. This is conceded even by the petitioners' own witnesses. Collins Chivers, a cooper, who testified for the petitioners, stated (p. 42, fol. 87):

> "Q. What kind of wood is best to make a cask out of? A. Oak.
>
> Q. What is the matter with chestnut casks? A. Well, so far as putting in chestnut generally the wood saps. It gets saturated and it don't hold; it is not as good and water-tight as oak."

And again (p. 43, fol. 88):

> "Q. Are chestnut staves as good for such purposes as oak staves are? A. The oak would be better.
>
> Q. Why are the chestnut staves not the best? A. Oak is understood by everybody in the business as the principal material that they use in making barrels, casks.
>
> Q. Why is it that the chestnut staves are not as good for olive casks? A. Well, they don't hold as good; that is, they are not water-tight to the same extent as the oak is.
>
> Q. Isn't chestnut a much softer wood than oak? A. Yes.
>
> Q. And much more brittle? A. Providing it would be dried out."

Also (p. 44, fol. 90):

> "Q. Is chestnut as strong a wood as oak? A. No.
>
> Q. Is a chestnut cask as strong as an oak cask? A. No, sir."

The following important testimony was also given by this witness (p. 44, fol. 91):

> "Q. Will you describe the condition of the casks? A. Well, there were some of them with the hoops rotten; that is, the iron was in a rotten condition and some of them were broken staves; some of them had broken chimes."

These casks were very large ones, weighing from 1,500 to 1,700 pounds each (p. 67, fol. 129). It was therefore particularly necessary that they be built of the strongest possible material, and held together by the best possible hoops. On the contrary they were constructed of an inferior class of staves and were bound with insufficient hoops.

What was the cause of the great leakage of olive brine on this voyage? It was not the result of any improper stowage, for that was admittedly good (Libellants' Exhibits 1 and 2, following p. 214). It was due to the insufficiency of the casks. And the leakage on the voyage, according to Captain Cocks, would cause the casks to become slack and their staves to open up (p. 71, fol. 137).

As to the insufficiency of the casks the trial Court said (Record, p. 222):

> "I think the great weight of evidence is to the effect that the chestnut casks containing the olives were old and insufficient at the time the merchandise left Seville for transhipment to claimant's vessel at Cadiz."

This conclusion was concurred in by the Circuit Court of Appeals, which said (p. 237, fol. 493):

> "In the instant cases the damage to the merchandise came within the exceptions of the

bill of lading, which declared that the shipowners were not responsible for breakage. That many of the casks were broken is undisputed. The burden of proof rested upon the libellants to establish negligence on the part of the claimant, and this burden we have no hesitation in saying was not sustained. On the contrary, it has been established by the overwhelming weight of evidence that whatever damage the merchandise suffered in the cases now before the court was due, not to the negligence of the ship, but to the old and insufficient containers in which the goods were shipped."

In the face of such evidence as that above cited, it is perhaps not surprising that the petitioners at the trial adopted the unusual expedient of admitting, by implication if not expressly, that their casks were insufficient, in order to bring themselves if possible within the rule of *Higgins et al.* v. *Anglo-Algerian S. S. Co., Limited, infra.*

POINT III.

The case of Higgins et al. v. Anglo-Algerian S. S. Co., Limited, 248 Fed., 386, which has been practically the sole reliance of the petitioners, is unsound, we submit, and should be overruled.

The decision in *Higgins et al.* v. *Anglo-Algerian S. S. Co., Limited,* which we shall refer to as the Anglo-Algerian decision, was rendered in 1918 by

the Court whose decrees are now under review herein. Although the petitioners strenuously argued below that the case supported their claim of estoppel, both of the lower courts held it to be inapplicable, pointing out various features which distinguished it from the instant cases. As no writ of certiorari was applied for therein, the soundness of the decision comes into question before this Court for the first time so far as we are aware.

The facts were these: Three thousand cases of dates were shipped on the steamer Armistan at Busrah, and a bill of lading was issued therefor reciting that they were received in apparent good order and condition. It was found on arrival of the ship at New York that 2,085 cases of the dates were damaged by contact with water. The libellants had become the owners and holders of the bill of lading in the ordinary course of trade. The respondent alleged that a number of the cases of dates were wet, stained and discolored by rain when received from the lighters, which condition had been noted on the mate's receipts, but that a clean bill of lading was delivered to the shippers at their request against their agreement to indemnify the respondent against loss for so doing. The respondent contended that this constituted an admission which was binding on the libellants that the casks were not shipped in apparent good order and condition. The District Court found that the cases were injured by rain water or sea water while on the lighters waiting delivery to the ship.

The libellants contended that the respondent was estopped from showing that the goods were damaged before shipment. The District Court (opinion reported in 242 Fed., 568), held that, conceding

the libellants' contention, the respondent was only estopped from denying that the goods were in apparent good order and condition, which left it free to show the actual condition of the goods, and that the damage thereto was occasioned by causes excepted in the bill of lading. The cause of action was essentially in contract. The Court said that the uttering of such a bill of lading was a tort, but that the libellants could have no relief in the admiralty action, first, because the cause of action was in contract and it was too late to amend the libel to set up an entirely new cause of action, and secondly, that the tort lay either in the issuance of the bill of lading at Busrah or the negotiation of same at New York, and that in either event the tort was committed on land and was outside of the admiralty jurisdiction. The libel was accordingly dismissed. The Circuit Court of Appeals for the Second Circuit reversed this decision and held that the respondent had been a party to a fraud perpetrated by the shippers upon innocent endorsees for value, and that, having introduced the evidence showing the fraud, it could not take the position that the libellants were recovering on a new and different cause of action.

It cannot be truly said that the libellants there obtained a recovery on contract and that the carrier was simply deprived of its defenses under its bill of lading. The Court really held the respondent liable in tort for falsely representing to the libellants that the goods were in apparent good order when received for shipment.

If a tort was committed it occurred either at Busrah on the issuance of the alleged false bill of lading or at New York, where the bill of lading

came into the possession of the libellants. It is probably correct to say that it culminated at the latter place. Obviously nothing was represented to the libellants until they saw the bill of lading at New York, for it came into their hands there in the ordinary course of business. The libellants therefore had no cause of action cognizable in admiralty.

In *Williams* v. *Providence Washington Ins. Co.*, 56 Fed., 159 (S. D., N. Y.), a libel was filed to recover under a policy of insurance issued by the respondent for the period of one year upon the canal boat General Williams against perils of the sea. The canal boat suffered damage through sea perils while lying at a dock at Stamford, Connecticut, in Long Island Sound. The lay-up clause was confined to the port, bay and harbor of New York. The place where the vessel sustained the injury was not within any of the limits covered in the policy. The libel alleged that the policy did cover navigation in Long Island Sound, according to the express representation of the respondent, and that upon the faith of such representation, the libellant accepted the policy and paid the premium. It was charged that this statement was falsely and fraudulently made, and the libellant claimed damages accordingly. The respondent excepted to the libel. Judge Addison Brown sustained the exception and said at page 160:

> "The libel does not in terms seek to reform the policy. If it did, that could not be done in this court, but only by a court of equity, upon a bill filed for that purpose. Of such an action this court would have no jurisdiction.

> Andrews v. Insurance Co., 3 Mason, 6, 16. The present action cannot be sustained upon the terms of the policy itself, because the loss occurred outside of the express limits of the policy. The complaint is, in fact, an action for false and fraudulent representations, by which the libellant was induced to accept the policy, supposing that he was insured for the Sound, when he was not. * * * As a tort, the case is not one of marine tort, because not arising upon the water, or in course of navigation. The exceptions are, therefore, sustained, and the libel must be dismissed; but, as the court has no jurisdiction, without costs."

In *The Plymouth*, 3 Wall., 20, several packing houses on land were destroyed by fire which originated on the steam propeller Falcon through the negligence of her crew, and spread to the buildings situated on the wharf, beside which the vessel was anchored. Mr. Justice Nelson, speaking for this Court, said at page 33:

> "It will be observed, that the entire damage complained of by the libellants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on land. It is admitted by all the authorities, that the jurisdiction of the admiralty over marine torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; and, being so dependent upon locality,

> the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark."

It is apparent, therefore, that the Anglo-Algerian decision is contrary to that fundamental principle of the admiralty which makes the court's jurisdiction over torts dependent on locality.

Moreover, the case is opposed to the numerous decisions of this Court holding that the transferee of a bill of lading acquires no greater right against the issuing carrier than the transferor had.

In *Pollard* v. *Vinton,* 105 U. S., 7, the owner of a steamboat was sued on a bill of lading for the non-delivery of 150 bales of cotton, according to its terms. The bill of lading was signed by the general agents of the defendant-in-error. No cotton had been received for transportation, so that the statement in the bill of lading was false. The plaintiff was an innocent holder for value, having accepted and paid a draft attached to the bill of lading.

This Court affirmed the decision of the United States Circuit Court for the District of Kentucky, and with regard to the nature of a bill of lading said, Mr. Justice Miller delivering the opinion, at page 8:

> "A bill of lading is an instrument well known in commercial transactions, and its character, and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to

pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. *Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it.* The doctrine of *bona fide* purchases only applies to it in a limited sense." (Italics ours.)

A leading case is that of *Atchison, Topeka & Santa Fe Ry.* v. *Harold,* 241 U. S., 371. There J. Bell & Son sold a carload of bulk corn to the C. V. Fisher Grain Co. of Kansas City, Missouri, and on September 21, 1910 shipped the corn from Yanka, Nebraska, over the Union Pacific Railroad. The consignment was to Topeka, Kansas, to the order of the consignors with a direction on the bill of lading "notify C. V. Fisher Grain Company c/o Santa Fe for shipment." A draft for the purchase price of the corn was mailed to Kansas City accompanied by the bill of lading duly endorsed, and the Fisher Grain Company, while the corn was in transit, paid the draft upon presentation and became the owner of the bill of lading. On September 24th the Fisher Grain Company surrendered the Union Pacific bill of lading to a Santa Fe agent at Kansas City, Missouri, and obtained a Santa Fe bill of lading referring to the same car, then somewhere on the Union Pacific tracks, whereby the shipment of corn was consigned to the order of the Grain Company at Elk Falls, Kansas, on the Santa Fe Railroad, with the direction to notify the Nevling

Elevator Company at Elk Falls. The Santa Fe bill of lading, although signed and issued on September 24th, was dated September 21, 1910, at which time the Santa Fe Railroad had not come into possession of the car. Harold purchased the cargo of corn from the Grain Company and directed that delivery be made to Shoe & Jackson. The car was not tendered for delivery to the Sante Fe until September 28th and was rejected and turned back to the Union Pacific on account of its bad condition. The grain was transferred to another car which was delivered to the Santa Fe. The transferred car did not contain the same quantity of corn as the original car did on account of damage to a considerable amount of same, through the leaky condition of the first car. The car into which the corn had been transferred was carried by the Santa Fe to Elk Falls and delivery tendered. In the meantime the contract period between Harold and Shoe & Jackson for delivery of the corn had elapsed and there had been a decline in the market price and the purchaser refused to take the car. Harold thereupon commenced a suit against the Santa Fe for alleged unreasonable delay in the delivery of the corn at Elk Falls. The defendant alleged that the delay was due to the fault of the Union Pacific. The plaintiff was allowed a recovery in the trial court and the judgment was affirmed by the Supreme Court of Kansas, which held that the plaintiff became the purchaser of the bill of lading for value, and therefore had a right to rely upon the face thereof, and to treat the corn as having been received by the Sante Fe Railroad at Kansas City on the date of the issuance of the bill of lading. The State court held that the innocent holder of the bill of lading was invested with rights which were not available to the shipper.

The case came before this Court on a writ of error to the Supreme Court of Kansas. The decision of the Kansas Supreme Court was reversed and this Court, through Mr. Chief Justice White, stated at page 377:

> "That the local rule applied by the court below was in direct conflict with the general commercial law on the subject as repeatedly settled by this court, is plain. *Shaw* v. *Railroad Co.*, 101 U. S., 577; *Pollard* v. *Vinton*, 105 U. S., 7; *Iron Mountain Ry.* v. *Knight*, 122 U. S., 79; *Friedlander* v. *Tex. & Pac. Ry.*, 130 U. S., 416; *Mo. Pac. Ry.* v. *McFadden*, 154 U. S., 155; *The Carlos F. Roses*, 177 U. S., 655, 665.
>
> "Nothing could better point out the irreconcilable conflict between the local doctrine applied by the court below and the general law as illustrated in the cases cited than does the following statement in the opinion in the *Roses Case* last cited (p. 665):
>
> > 'A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it.'"

This Court has by no means restricted the rule to cases where no goods at all were received by the carrier, but has applied it where the merchandise received was inferior in grade to that de-

scribed in bills of lading, regardless of whether the carrier's employes had knowledge of the facts or not.

In *St. Louis I. M. & S. Ry. Co.* v. *Knight et al.*, 7 Sup. Ct. Rep., 1132 (122 U. S., 79), the plaintiffs sued the railway company alleging that 525 bales of cotton received by them from the carrier were not of the grade and quality designated by the marks appearing on the bills of lading. The plaintiffs asserted that there [illegible] 500 bales of cotton of an inferior grade in the [illegible] house of the defendant which the employes of Potter, the seller of the cotton, with the knowledge of the defendant's freight agent, re-marked with marks corresponding to the quality stated in the bills of lading. The trial court instructed the jury that if the agent of the defendant accepted the cotton for shipment knowing that its quality was inferior to that called for by the bills of lading, and that the marks on the bales had been changed to correspond with the higher grade of cotton designated therein, the defendant was liable.

Such charge was held to be erroneous by this Court, which said, with reference to the charge, at page 1140:

> "Taken, as it must be, in view of the undisputed facts, it would make it to have been the duty of the defendant, when the cotton in question was tendered by Potter for delivery to the railroad company to be carried under the terms of the bills of lading sued on, to have refused the shipment altogether, on the ground that the goods offered did not correspond in grade and quality with those called

for by the bills of lading. As we have already seen, the defendant undertook no such obligation in respect to these plaintiffs. The only alternative, if they did not receive them, would be to reject them altogether, and to refuse to carry them. In that event, upon the facts as they stood, the plaintiffs would have lost the whole 525 bales, instead of merely the difference between the value of those actually carried and those which Potter had agreed to deliver. For, on this supposition, Potter had no other cotton except this to deliver, and the case would have stood, as between the plaintiffs and the defendant, upon bills of lading where no property at all had been received by the carrier for transportation, bringing it exactly within the rule declared in *Pollard* v. *Vinton*, 105 U. S., 7."

The judgment of the lower court in favor of the plaintiffs was reversed.

There is, we submit, no distinction in principle between those cases where a carrier's agent knowingly signs a bill of lading acknowledging the receipt of goods which either have not been received or else do not measure up to the quality called for by the bills of lading, and one where the agent signs a bill of lading reciting that the merchandise is in apparent good order when in fact it is not. If the circumstances under which a bill of lading has been delivered may be inquired into, even though it has reached the hands of an innocent transferee, the rule must necessarily be the same in all of the cases mentioned.

The fact that certain carriers have been made liable on bills of lading falsely stating that goods

have been shipped or incorrectly describing the class thereof, by Section 22 of the Bills of Lading Act of 1916 (Act of Aug. 29, 1916, C. 415), does not, it is needless to observe, alter the general principles underlying the decisions of *Pollard* v. *Vinton* and other cases, *supra*.

If the Circuit Court of Appeals, in disposing of the Anglo-Algerian case, had followed the principles of the cases cited above, it would have decided against the libellants, for it is evident that the original holders of the bill of lading there could have obtained no recovery against the carrier.

It is therefore respectfully submitted that the decision, for the reasons given, should be overruled.

POINT IV.

Neither the steamship Isla de Panay nor her owner, the claimant-respondent, is estopped from showing the insufficiency of the petitioners' casks.

The question as to responsibility of the Isla de Panay appears to us to have two phases: First, whether the acts of her owner on which the petitioners base their claim of fraud are imputable to her; and second, if so, whether the vessel is liable in any event under the circumstances. The Compania Trasatlantica was not joined in the suits.

With respect to the first angle of the question, the reasons given by the Circuit Court of Appeals for not holding the ship liable in rem are important. The Court held that the vessel was free from

liability for the following reasons: That the bills of lading and the letters of guaranty were respectively delivered at Seville, Spain, whereas the Isla de Panay received the merchandise at Cadiz, Spain, a transshipment port; that the bills of lading were not presented to nor seen by the master or any officer of the vessel at Cadiz, Spain; and that the letters of guaranty were neither given to nor seen by the master or any officer of the vessel at the time of the transshipment of the goods.

It seems elementary that the petitioners, in order to obtain a recovery against the vessel in rem, should be required to show some connection between the ship (through her officers) and the acts upon which they rely to establish their case. This they have completely failed to do. The Isla de Panay was not at Seville at all. She came through to Cadiz from Barcelona by way of the ports of Valencia, Almeria and Malaga (p. 103, fol. 193). The port of Seville, where the through bills of lading were issued and the letters of guaranty received, is situated some seventy-five miles up the Guadalquiver River above Cadiz. The guaranties were delivered to the claimant-respondent's agent at Seville in return for the bills of lading, which were signed, not by the captain of the Isla de Panay, but by the captain of the S. S. Mogador belonging to the same owner (pp. 211-212, fol. 419; p. 144, fol. 258). The Isla de Panay had not even reached Cadiz when the bills of lading were issued at Seville (p. 74, fol. 142; p. 218, fol. 443). The Mogador transported the casks down the river and delivered them to the Isla de Panay at Cadiz. The evidence amply sustains the conclusions of the Circuit Court of Appeals that neither the master nor any of the officers of the Isla de Panay

had anything whatever to do with issuing these bills of lading and obtaining the guaranties, and the Court's decision that the vessel could therefore in no event be held liable in rem appears unassailable.

The consequences of a contrary holding would be far reaching. Any act of a shipowner relating to the transportation of cargo received for shipment would then be held imputable to whichever of his ships subsequently carried it. Such a result would be absolutely opposed to the accepted theory of a vessel's responsibility in rem for damage to or loss of cargo. It does not follow that because a shipowner may be responsible for the acts of his ship the vessel is liable for the acts of her owner. A vessel may, of course, be attached under the laws of the various States in a suit at law against her owner but such procedure is not on any theory of liability in rem. She is simply the property of the owner and liable to attachment as such.

In *The Eli Whitney* (1848), Fed. Cas., 4345, a libel in rem was filed for the alleged breach of a charter-party. The court dismissed the libel. Mr. Justice Nelson, sitting in the Circuit Court for the Southern District of New York, held that parol evidence was inadmissible to enlarge or vary the terms of the charter-party, there being no stipulation in it as to the precise amount of cargo to be carried, and that, in the case of a charter-party, a suit in rem was not maintainable for the misrepresentation or concealment of facts by the master or owner of a vessel in respect to her tonnage or capacity, and affirmed the decree of the lower court.

The petitioners should have joined the Compania Trasatlantica in personam in these suits, in order to have presented directly before this Court the

points which they are urging, unless of course the vessel and her owner are to be treated as one for the purpose of determining liability.

This brings us to the second aspect of the question, which involves the assumption that the issuance of the bills of lading by the representatives of the claimant-respondent at Seville was in effect the act of the Isla de Panay. Can the vessel then be held liable? If the shipowner itself was not liable to the petitioners, certainly under no circumstances can the ship be held in rem.

We submit that the Compania Trasatlantica did nothing in connection with the issuance of the petitioners' bills of lading which would constitute a proper basis of an action for fraud against it in any court, and hence that it would not, if sued on the claims set up herein, be prevented from proving the actual defects in the casks.

Apart from the fact that the present suits were brought against the vessel only, there are four features which distinguish these cases from the Anglo-Algerian case, namely:

1. The bill of lading there provided that the merchandise should be delivered at New York unto order or to his or their assigns, whereas the bills of lading here were straight bills of lading, the goods being deliverable to designated consignees.

2. In the Anglo-Algerian bill of lading there was a specific statement that the goods were received in apparent good order and condition. The bills of lading herein contained no such statement. Nothing was said in them one way or the other concerning the order and condition of the goods.

3. In that case the question of insufficiency of

containers was not involved. The respondent there attempted to show that the goods themselves were actually damaged on shipment. Here no claim is made that the petitioners' olives were in a damaged condition when shipped. The claimant-respondent simply contends that the casks were not strong enough to insure the safe carriage of their contents, if properly handled.

4. The casks here were in fact in apparent good order and condition when received for shipment by the claimant-respondent in Seville.

1. The petitioners' bills of lading were straight bills of lading, the goods being consigned in each instance to a specified person.

The only bill of lading which is printed in the record is that of Austin, Nichols & Company (pp. 215-218). This bill of lading starts as follows (p. 215):

> "M. Rowlett and Pyman has shipped on board the Spanish steamer Isla de Panay, its Captain M with destination to New York (stamp) and consigned to Austin Nichols the effects declared on back * * *."

In the stipulation as to exhibits (p. 230, fol. 475) the parties have agreed "that the bills of lading are all of the same form and contents (with necessary changes in names and amounts), as the ones reproduced in the foregoing record."

The Act of August 29, 1916, C. 415, Section 2, 8 U. S. Comp. Stat., Section 8604aaaa, usually referred to as the Bills of Lading Act, was in effect when these bills of lading were issued. It defines a straight bill of lading as follows:

> "A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill" (39 Stat., 539).

It is also provided in the same Act, Section 29, 8 U. S. Comp. Stat., Section 860400 as follows (39 Stat., 543):

> "A straight bill of lading cannot be negotiated free from existing equities, and the endorsement of such a bill gives the transferee no additional right."

The above quoted provisions made no substantial change in the existing mercantile law as recognized and applied by the courts of the United States and of England (aside from the English Statutes).

Scrutton on Charter Parties and Bills of Lading (Ninth Edition) states at page 168, Article 56:

> *"Semble.*—A bill of lading which does not contain some such words as 'to order', or 'to order or assigns', or which is indorsed in full, but without such words (k), is not a negotiable instrument (1).
>
> Note 1.—'Negotiable' is a term which perhaps strictly should be reserved for instruments which may give to a transferee a better title than that possessed by the transferor. A bill of lading is not 'negotiable' in this sense: the indorsee does not get a better title than his assignor (m). A bill of lading is 'negotiable', to the same extent as a cheque marked 'not negotiable', i. e., it is 'transferable'."

An order bill of lading is defined by the same Act, Section 3, 8 U. S. Comp. Stat., Section 8604b, as follows:

> "A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill."

Negotiation of an order bill of lading is covered by Section 30 of the Act.

The Anglo-Algerian bill of lading was an order bill as recognized by the commercial law and as later defined by the Act. (It was issued before the Act took effect.)

As the transportation of the petitioners' goods was from a foreign port to a United States port, it would appear not to come expressly within the terms of the Act. However, it would be little short of absurd to say that a bill of lading wherein the goods are stated to be consigned to a specified person, is to be classified as a straight bill on outbound, but not on inbound, foreign shipments. If it is a straight bill in one direction it cannot be something different in the opposite direction.

At any rate it is immaterial whether we look to the Act or to the general commercial law as fixed by this Court in numerous decisions in order to ascertain what are the rights of holders of this type of bill of lading. In no case do they acquire rights beyond those of their transferors. The rule followed in *St. Louis I. M. & S. Ry. Co.* v. *Knight et al.; Pollard* v. *Vinton* and other cases *supra* would apply *a fortiori* to straight bills of lading.

The Circuit Court of Appeals, holding that the petitioners' bills of lading were straight bills, said (Record, p. 239):

"The bills of lading in the instant cases were straight bills of lading. The Act of August 29, 1916, known as the Bills of Lading Act, declares 'That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.' 39 Stat. L., p. 539, Sec. 2. And the Act makes straight bills non-negotiable and order bills negotiable. Section 29 of the Act provides that a straight bill cannot be negotiated free from existing equities. Where the shipper names another as consignee the title to the goods is in the person so named. George F. Hinrichs, Inc. v. Standard Trust & Savings Bank, 279 Fed., 382, 386. If the consignee in a straight bill pays the consignor for the goods before he receives them, or directs his banker to pay for him on the presentation of a clean bill of lading he pays at his own risk. If the goods reach him in damaged condition he cannot hold the ship liable unless he can show that the damaged condition of the merchandise was occasioned by the ship's default. In the instant cases no such default on the part of the ship is shown."

If the shippers had sued the Compania Trasatlantica or the Isla de Panay for this damage they could not have recovered, for the loss was due to insufficiency of package, against which they had indemnified the shipowner. As the petitioners took their bills of lading subject to any equities existing between the carrier and the shippers, they stand in the position of the shippers, with no right of recovery herein.

2. The Anglo-Algerian bill of lading contained an

express statement that the goods were received in apparent good order and condition. The petitioners' bills of lading (Claimant's Exhibit 2, pp. 215-218) on the contrary, contained no such statement. They simply acknowledged that the merchandise had been received and made no mention of its condition.

The lower Court considered that the absence of such a statement (aside from other grounds of dissimilarity) created a vital distinction between the cases at bar and the Anglo-Algerian case. Concluding its opinion the Court said (Record, p. 242):

> "In the Higgins case the bills of lading recited that the shipments had been received in good condition. In the instant cases the bills of lading contain no representation as to their condition one way or the other, and the distinction is vital."

The petitioners have argued, however, that the claimant-respondent was required by Section 4 of the Harter Act (7 U. S. Compiled Statutes, p. 8587) to issue bills of lading stating the apparent order and condition of the merchandise.

Section 5 of the Harter Act (7 U. S. Compiled Statutes, p. 8590), provides as follows:

> "For a violation of any of the provisions of this act, the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding $2,000."

This is the only penalty prescribed by the Act for

the issuance of a bill of lading not in conformity with its terms. The claimant-respondent, however, would not be subject to such a penalty in this instance, for two reasons; first, because the bills of lading were issued in Spain, and although the Harter Act applies to shipments between United States ports and foreign ports in either direction, the penalty provided by the Act could not be enforced in a case where the issuance of the bills of lading took place in a foreign country; second, in any event, a carrier is subject to the penalty only in case of a refusal to issue the required bill of lading *on demand*. This record shows no such demand.

A carrier issuing a bill of lading which is silent as to the condition of the goods, is not thereby penalized by being deprived of the defenses ordinarily available under the Act. This contention was upheld by the lower Court (Record, p. 241, fols. 500, 501).

As bearing upon the sections of the Harter Act referred to, the case of *The Isola di Procida*, 124 Fed., 942 (S. D. N. Y.) is in point. A libel was filed against the steamship Isola di Procida to recover damages resulting from the issuance of a false bill of lading. The bill of lading was dated September 30, 1901, on which date no merchandise had been received on the steamer. The goods were not received by the vessel until October 12th. Between the time when the brimstone should have arrived at New York if shipped according to the bill of lading, and the time when it actually did arrive, the price of brimstone had fallen, and the libellant who had paid the draft for the purchase price of the goods sued to recover the damage caused by the fall in the price of the merchandise.

Judge Holt, referring to Sections 4 and 5 of the Act, stated, at page 944:

> "The true construction, in my opinion, of the provisions of the Harter Act in regard to bills of lading is that the rule previously established in the federal courts that a false bill of lading is not binding on the owner of the ship still remains the law; but, if a false bill of lading is given, the person giving it is liable to a fine not exceeding $2,000, and the amount of that fine is made a lien on the vessel. But any damage caused by the falsehood does not create any lien on the ship. The true remedy of the party injured in such a case is an action against the person who actually issued the false bill of lading."

The libel against the ship was dismissed.

No representation whatever was made either by the claimant-respondent or the Steamer Isla de Panay to the petitioners that their goods were even in apparent good order and condition when received for shipment.

The petitioners have laid great stress upon the obtaining by the claimant-respondent of so-called letters of guaranty from the shippers, whereby the shippers undertook to hold it harmless in case any damage should result from insufficiency of the packages (Claimant's Exhibits 13, 14 and 15 for identification, pp. 220, 221, fols. 449-451).

The Circuit Court of Appeals in the Anglo-Algerian case did mention the fact that a guaranty was received from the shipper, but an examination of its decision discloses that the delivery of the guaranty was not the turning point of the case. How can the fact that letters of guaranty were received

enter into the question of estoppel? The petitioners never saw these letters. They did not even know of their existence when they received their bills of lading.

The elements of an estoppel are well set forth in the case of *Central Improvement Co.* v. *Cambria Steel Co.*, 210 Fed., 696 (C. C. A., Eighth Circuit), at page 718:

> "The indispensable elements of an 'estoppel in pais' are: (1) Intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation; (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel; (3) action by the latter induced by the misrepresentation; and (4) injury to the latter if the truth is permitted to be proved."

The lower Court herein, quoting in part from the American and English Encyclopedia of Law, said (Record, p. 238, fol. 495):

> " 'The general rule is that a bill of lading in so far as it admits the receipt of goods by the carrier and states the character, quality, quantity, or condition of the goods when they were received, is a mere receipt, and may be explained and contradicted by parol evidence.'
> *But in the instant cases the bills of lading do not need to be contradicted as they are silent as to the condition of the merchandise when it was received.*" (Italics ours.)

The petitioners have failed to establish any of the elements of an estoppel.

3. The Anglo-Algerian case did not involve the issue of insufficiency of package. Here the sole cause of the damage was the weakness of the casks, by reason of which the Isla de Panay and the claimant-respondent have claimed exemption from liability under the Harter Act as well as by Clause 7 of the Bills of Lading (p. 216, fol. 439; Claimant-Respondent's answer, p. 4, fols. 9, 10; p. 5, fol. 11).

The Harter Act allows a vessel and her owner complete exemption from liability for loss arising from insufficiency of package (in the absence of negligence) provided only that the owner of the vessel shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied at the beginning of the voyage. These requirements in the case of the Isla de Panay were fully complied with by her owner.

The petitioners' argument in effect is that a carrier, in a case where the sufficiency of the containers is doubtful upon shipment, must make an appropriate notation on the bills of lading at the risk of being deprived of its defense under the Harter Act by an estoppel. There is no such provision in the Act itself. If transportation companies are to be required to do what the petitioners demand, a condition will have to be read into the Harter Act which was not incorporated therein by Congress. Such a requirement cannot properly be implied, for if the Congress had intended the exemption to be conditional upon a carrier's noting the insufficiency of the containers on the bills of lading, it would have said so. It must be assumed that the legislators were cognizant of the fact that insufficiency of package is most often due to inherent deficiencies in the materials of which a con-

tainer is fabricated, which exist, and are apparent, when the package is shipped. The staves of a barrel do not ordinarily become bad after the voyage has begun. If a crate is frail, such condition obviously exists before shipment. Furthermore the Courts, in passing upon cases where the defence of improper containers has been pleaded have imposed upon the carriers no such condition as that suggested herein.

In *The Konigin Luise*, 185 Fed., 478 (C. C. A., Second Circuit), a suit was brought to recover for the leaked out portion of a consignment of 200 barrels of olive oil shipped from Smyrna to New York. The bill of lading contained an acknowledgment of receipt of the goods in good order and condition externally. The report of the decision of the District Court in 173 Fed., 811 shows (p. 812) that the carrier raised the defense of insufficiency of package. The libellant also raised the question of estoppel, claiming to be a purchaser for value of a clean bill of lading. The decree of the District Court, in favor of the libellant, was reversed by the Circuit Court of Appeals. The evidence showed that a large number of the barrels were found empty at New York, many of them having broken heads and loosened and missing hoops. The Court stated at the outset, that although the barrels were in apparently good condition, they were not new barrels but a mixed lot of second hand barrels, some of them having patches on the staves. There was no proof of bad stowage or mishandling. The Court held that the carrier was exempt because the loss was due to breakage. Although the question of insufficient package was not specifically referred to by the Court, nevertheless it was involved in the case, because the breakage was due unquestionably

to the poor condition of the barrels. If the petitioners' contention is correct, the owner of the Konigin Luise, not having noted on the bill of lading that the barrels were of inferior strength, should have been held estopped from showing breakage or insufficiency of container as against the libellant, a purchaser for value. Judge Adams in the lower court held, however, that the claimant-respondent was not estopped. This case is a direct authority against the petitioners.

In *The Orion*, 290 Fed., 379 (C. C. A., Second Circuit) various libels were filed against the steamship Orion and her charterer, the Ocean Transportation Corporation, for extensive damage to various consignments of olives, olive oil and sulphur olive oil. The bills of lading were in the same form as those of the petitioners to the extent that they were silent as to the condition of the merchandise when shipped. The sulphur oil leaked so badly after it was loaded aboard the Orion at Seville, Spain and before the vessel left that port that it was necessary to pump large quantities of it from the bilges every day. The District Court decided that the barrels containing the sulphur oil were insufficient containers and this decision was affirmed by the Circuit Court of Appeals. There were no notations on the bills of lading that the barrels were considered insufficient.

In *The Koranna*, 214 Fed., 172 (S. D., N. Y.), the libellants sued for damage to a consignment of cocoanut oil pipes. The bill of lading acknowledged the receipt of the merchandise in apparent good order and condition.

Judge Hazel decided the case against the libellants on the ground of insufficient containers, and stated as follows at page 174:

"There is much testimony in support of respondent's contention that the casks lacked strength and durability for so long a voyage. It is indisputable that the pipes of other shipments stowed in the same hold in the same way and subject to similar strains arrived in good condition, while libellants' casks were considerably damaged. Several coopers, who were witnesses, swore that the staves of the casks from which the oil leaked were old and rotted, and could easily be indented; also staves were found bearing score marks indicating repeated use. Three of the casks in question were inspected by the court on the sidewalk in front of the courthouse, and it was quite apparent that part of the staves were pressed in at the quarters and were old and tender to pressure, and that the bilges were impaired. It is quite true that cocoanut oil soaks into the wood and gives it a moldly appearance; but in the casks inspected by me the newer staves, which were easily distinguishable from the older ones, looked strong and lasting, while those that had evidently been previously used were decidedly weak and dilapidated, leaving the impression in my mind that the leakage was caused by improper cooperage in combining old and worn out staves with new ones, thus producing casks which were unable to withstand the weight of their contents and the strains of the voyage."

In the cases cited the condition of the barrels and casks was apparent on shipment. The defects which made the containers insufficient, namely, the intermingling of new and old staves, the use of

patched staves, etc., did not arise after the bills of lading were signed. They were patent and not latent defects when the goods were shipped. And the same may be said to be true of virtually all defects tending to weaken a package.

The fact, therefore, that the Harter Act allows exemption to carriers, subject only to the limitations already stated, where the loss is the result of the weakness of the packages themselves, is sufficient to exclude the instant cases from the principles of the Anglo-Algerian case, even if sound.

4. The petitioners' casks were actually in apparent good order and condition when received for shipment at Seville. This statement is not at all inconsistent with the fact that the casks were improper containers. All that a bill of lading acknowledgment that goods have been received in apparent good order and condition can mean is that they were not received damaged. These casks were neither in a broken nor otherwise damaged condition when stowed on the Mogador at Seville, for the shippers' coopers had been working on them for some time while they were lying on the quay before shipment, tightening their hoops and staves, replacing missing hoops with others, and stopping any leakages. If, therefore, the bills of lading had said that they were received in apparent good order and condition, the statement would have been true.

Captain Pastrana of the Mogador testified that brine was leaking from the casks on the quay at Seville, but that the coopers of the shippers had repaired the casks before they were loaded, which stopped the leakage for the time being (pp. 151, 152, fols. 275, 276). He also testified that the

coopers inserted paper in the joints between the staves and tightened the hoops; and that the casks were not broken at Seville, but that some of their hoops were broken, in place of which hoops others were substituted before the casks were stowed on the Mogador (p. 158, fols. 289-291). The captain said that no casks were broken when loaded aboard the Mogador (p. 159, fols. 291-293); also that no leaky casks were stowed in the holds of the Mogador, but that any such casks were left on deck and repaired by the shippers' coopers (pp. 159, 160, fols. 293-295); and that none of the olives spilled out while the casks were being loaded at Seville (p. 165, fol. 306).

Captain Pastrana is supported in his testimony by Diego Garcia, the foreman stevedore at Seville (pp. 171, 172, fol. 322; p. 182, fol. 348); Jose Montiel, the boatswain of the Mogador (pp. 182, 183, fols. 348, 349); Mariano Santacana (p. 198, fol. 386; p. 201, fol. 393), and Manuel Samano (p. 199, fol. 388; p. 201, fol. 392; p. 201, fol. 393).

There was little, if any, difference between these casks and the barrels involved in the case of *The Konigin Luise, supra.* There Judge Lacombe described the containers as being a mixed lot of patched second-hand barrels, and at the same time said that they were apparently in good condition when shipped.

The petitioners' casks, although apparently in good order for containers of their age, after they had been recoopered on the quay, broke and loosened up on the voyage simply because they were not strong enough containers for olives.

The petitioners in support of their claim of estoppel contend that a representation by the carrier that their merchandise was in apparent good

order must be implied because the bills of lading contained no endorsement to the contrary. If this were conceded to be so (which is not admitted) the petitioners would be in no better position, for the implied representation would be true.

The petitioners have followed a strange course. Their libels were drawn on contract and yet at the trial they demanded a recovery in fraud. The Anglo-Algerian case was decided in February, 1918, and these cases were tried in October, 1922. The petitioners made no move during the intervening years, not even on the trial, to amend their libels. They are still libels on contract. They are accordingly in no position, regardless of the merits of their claims, to attack the decision of the lower Court.

Reply to Petitioners' Brief.

In their statement of facts at page 4 and, in fact, throughout their brief, the petitioners refer to Jose Benjumea of Seville, Spain, as the agent of the steamship Isla de Panay. *Benjumea was not the agent of the Isla de Panay but the agent of the Compania Trasatlantica at Seville. Seville was not even a port of call for this vessel. She was a mail steamer, in addition to being a freight carrier, and stopped only at ports on the direct route between Barcelona and New York.* The Compania Trasatlantica maintains passenger and freight services throughout a large part of the world. If its agent at Seville could properly be called the agent of the Isla de Panay, it would follow that its representatives in Buenos Aires and Manila would also be the agents of the Isla de

Panay, whether the ship ran to those ports or not. This is plainly absurd. The appointment of a certain person as the representative of the Compania Trasatlantica at Seville did not *ipso facto* constitute him the agent of all of that company's vessels, in whatever trade engaged.

On page 6 reference is made to certain testimony of Captain Muslera of the Isla de Panay as to why the letters of guaranty were given in Seville. This testimony was given by the captain on redirect examination. It will be recalled that he was not present in Seville on the occasion in question and had never even seen the guaranties until they were shown to him on the taking of his deposition. Captain Muslera was clearly incompetent to give any testimony as to what Spanish banking houses would or would not do with regard to these bills of lading. He had been going to sea since 1888, had had his master's license since 1891, and had been in the employ of the Compania Trasatlantica since 1896 (p. 73, fol. 141). He knew nothing whatever concerning the delivery of these bills of lading in exchange for the letters of guaranty at Seville (pp. 141, 142, fols. 254-256, pp. 148, 149, fols. 266-269).

The petitioners never offered the testimony of any witnesses familiar with the customs of banking or insurance companies of Spain to show what was the custom there with respect to accepting bills of lading with no notations on them. Captain Muslera was exclusively a sea-faring man.

The fact that the testimony was brought out on re-direct examination does not make it competent.

In *Marine National Bank* v. *National City Bank*, 59 N. Y., 67, the New York Court of Appeals, on

a motion for a reargument of an appeal involving banking custom with regard to certification of checks, stated at page 73:

> "The affidavits upon which the motion in this instance is founded, and the statements put forth in them are not competent on this motion, and would not be competent as evidence for any purpose in any stage of the action. They are entitled to great respect by reason of the character and standing of the affiants, the distinguished positions they occupy, and their eminent fitness by reason of their great intelligence, and long and large experiences, to speak upon the subject of commercial usages, and moneyed transactions. Usage and custom properly proved can impress upon words and phrases a peculiar or technical meaning, and control the interpretation and effect of commercial contracts, but such custom and usage must be proved and determined, as a question of fact, upon the trial, and proof of them cannot be received by an appellate tribunal, having only jurisdiction of questions of law, either in support or impeachment of a judgment. But an insurmountable objection to the evidence now offered in any stage of the action, would be that neither of the eminent gentlemen whose affidavits are presented, profess to have any knowledge of any custom or usage, either general or particular, by which any meaning or interpretation has been given to the words used in the certifying of checks by the bank upon which they are drawn or effect to the act of certification other

> than that which the language used in its ordinary and popular sense would imply. There is no pretence that the enlarged liability now sought to be fixed upon a bank certifying a check, has ever been recognized, acknowledged, or acted upon. No such practical interpretation has ever been put upon a certification as is now insisted upon. General usage, and not individual opinions, make a custom that can control in the interpretation of contracts."

On pages 6 and 7 it is said that the bills of lading were not signed by the captain of the Mogador as was found by the lower Court, but by the agent at Seville. We insist nevertheless, that the bills of lading were in fact those of the captain of the Mogador, even though the captain's name was affixed thereto by the company's agent with a rubber stamp. Captain Pastrana testified with reference to these bills of lading as follows (p. 152, fol. 277):

> "The signatures on claimant's exhibits numbers 2, 3 and 4 shown to me by the commissioner are those of the rubber stamp bearing my name and I acknowledge them to be mine."

On page 7 it is asserted that Benjumea, the agent at Seville, testified that he was authorized to sign bills of lading as agent for the captain of the Isla de Panay. This is a distortion of his testimony. What he said was as follows (p. 211, fols. 417, 418):

> "The only importance attached to this procedure is the bills of lading having been signed

by the Captain of the Mogador instead of by the Captain of the Isla de Panay *or myself as agent* due to the latter's absence." (Italics ours.)

The remark on page 11 of the petitioners' brief that the captain and the second officer of the vessel noted the condition of the casks on the shipping orders, but failed to note it on the bills of lading, is very misleading. Neither the captain nor any of the officers of the Isla de Panay saw these bills of lading at Cadiz. They were through bills of lading from Seville.

Again on page 11, it is stated that no demand was made at New York that new hoops be substituted for the rusty ones which would fall off on being touched. Why should the ship's officers request the cargo owners to repair their own casks at New York? The petitioners' surveyors had inspected the cargo and they had their own coopers on the dock who were perfectly capable of making any necessary repairs to the casks.

On page 12 the ship's carpenter is referred to as being incompetent to replace the hoops which fell off the casks as they were being taken aboard the Isla de Panay at Cadiz. Chief officer Corvera simply said that the carpenter was not a cooper and did not undertake to replace hoops missing from casks (p. 115, fols. 210, 211). Furthermore, where would the new hoops come from? Was the ship obliged to carry a supply of hoops for this purpose? Most decidedly it was not.

On page 13 the petitioners say that the lower Court expressed the opinion that the ship owner might be liable in personam, although the ship was not liable in rem. This statement is not true. The

Circuit Court of Appeals expressly declined to pass upon the liability of the claimant-respondent. If any inferences are to be drawn from the opinion they are that the Court considered that the ship owner itself was not liable.

On page 14 the petitioners refer to our previous statement that the casks were actually in apparent good order when shipped on the Mogador at Seville. They seem unable to see any distinction between an old package and a damaged package. A container may be old and yet apparently be in good order. We repeat that the petitioners' casks were not received by the Mogador in a damaged condition, as they had been previously thoroughly recoopered. The company's agent himself testified that although the casks were very old and consequently appeared weak, they were not broken (p. 209, fol. 414, p. 213, fol. 423).

It is further said on page 14 that it is immaterial whether the casks were in apparent good order and condition at Seville or not, because they were leaking when received by the Isla de Panay at Cadiz, at about which time the bills of lading were delivered to the shippers at Seville. We fail to see the connection between the transhipment at Cadiz, and the delivery of the bills of lading in Seville. The bills of lading, which were dated on or about October 27, 1917, were delivered about November 5, 1917, at which time the cargo had left Seville. The local agent then had nothing further to do with it and of course did not know that the hoops of some of the casks dropped off when they were being taken aboard the Isla de Panay at Cadiz.

The petitioners, on pages 17 and 18 of their brief, in discussing the testimony of the ship's witnesses at Seville relating to the condition of the casks

there, lay emphasis on the statements of the witnesses that the casks were in "bad condition." It is evident that what the witnesses had in mind was the age of the casks and their consequent insufficiency as containers for olives, for the witnesses at the same time said that the casks had been recoopered on the quay, and thus put in condition for shipment.

On page 18 the petitioners say that the claimant-respondent's witness Garcia made objections as to the condition of the casks to the agent of the Isla de Panay. This is also incorrect. The witness merely said that he objected to the agent (p. 190, fol. 367).

On page 19 the petitioners assert that the lower Courts found that the petitioners had been defrauded. The lower Courts on the contrary made no such finding. This same misstatement is made under the heading of Point I (p. 20).

On pages 21 and 22 the petitioners endeavor desperately to make it appear that the ship was directly concerned with the issuance of the bills of lading and the taking of the guaranties. Inasmuch as the record shows the facts to be quite to the contrary we shall not answer the statements appearing on these pages further than to repeat that the master of the Isla de Panay never saw the bills of lading until they were shown to him at New York and that the vessel was at sea when the casks were being loaded aboard the Mogador at Seville.

On page 30 the petitioners cite the case of *H. Scherer & Co.* v. *Everest*, 168 Fed., 822, and on page 31 the case of *The Tampico*, 270 Fed., 537, on the question of estoppel. The first mentioned case deals with negotiable instruments and therefore has

no application to the instant cases. The second case is likewise not in point as it involves express representations concerning the terms of a charter party. Moreover, as regards the function of an estoppel, this Court, through Mr. Justice Swayne, stated in *Dickerson* v. *Colgrove*, 100 U. S., 578, as follows, at page 580:

> "*It is available only for protection, and cannot be used as a weapon of assault.*" (Italics ours.)

That is precisely the use which the petitioners herein are seeking to make of the alleged estoppel. They wish to use it as a sword.

The petitioners' argument on pages 33 and 34, divided into four points, is based entirely on a false premise, namely, that the person who issued the bills of lading on behalf of the captain of the Mogador and delivered them to the shippers in exchange for letters of guaranty, was the agent of the Isla de Panay. He was not the agent of the ship in any sense of the word.

On pages 35-37 appear numerous excerpts from Williston on Contracts, wihch are cited in support of the petitioners' contention that an estoppel arose against the Isla de Panay because of the omission of any reference in the bills of lading to the suspected insufficiency of the casks. On the contrary it has always been the law, as stated by the lower Court, that a bill of lading, being an instrument of a dual nature, a receipt and a contract at the same time, may be explained, modified and even contradicted insofar as the acknowledgment of receipt refers to the character, quality, quantity or condition of the goods.

Mr. Justice Clifford, speaking for this Court, in *The Delaware*, 14 Wall., 579, said at page 600:

> "Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated."

And again at page 601:

> "Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the receipt, is merely *prima facie* evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence. Text writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators

> agree that the instrument may, as between the carrier and the shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites, but in all other respects it is to be treated like other written contracts."

In *Argo Steamship Co.* v. *Scago, et al.*, 101 Fed., 999 (C. C. A., Fifth Circuit), Judge Pardee, in considering a case where sugars received under a bill of lading, acknowledging their receipt in apparent good order and condition, were delivered in damaged condition, stated at page 1,000 as follows:

> "The libellants having alleged and proved that the sugars were delivered in a damaged condition, and as the bill of lading recited that the sugars were received in apparent good order and condition, and the carrier's contract was to deliver in like good order and condition, the burden of proof was on the claimant to show, either that the goods were not in good order when received by the ship (see Nelson v. Woodruff, 1 Black, 156, 160, 17 L. Ed., 97), or that they were damaged while in transit through one of the perils excepted in the contract."

This case was cited with approval in *The Aki Maru*, 255 Fed., 721 (C. C. A., 9th Circ.).

On page 37 the petitioners incorrectly state that the Circuit Court of Appeals for the Second Cir-

cuit was composed of different Judges from those deciding the instant cases, when it rendered its decision in *Higgins, et al.* v. *Anglo Algerian S. S. Co. Limited, supra.* Judge Rogers who wrote the opinion herein, and Judge Mayer who concurred therein, both participated in the Anglo-Algerian decision.

On page 40 the petitioners refer to the case of *Crawford & Law v. Allan Line S. S. Co. Ltd.* (1912), A. C., 130, on the subject of estoppel. This case was cited by the Circuit Court of Appeals in its decision in the Anglo-Algerian case. The bill of lading there acknowledged the receipt of the flour "in apparent good order, except as noted." The Court found that the carrier had not established that the goods had been damaged before being received. Lord Gorell said at page 143:

> "And I think it would be for the respondents, if they could, to show that the damage complained of was in fact done before they received the goods. The Lord Ordinary found that they had not discharged the onus of proving this."

The Circuit Court of Appeals also cited in the Anglo-Algerian case the English decisions of *Compania Naviera Vasconzada* v. *Churchill & Sim*, 1906, 1 K. B., page 237, and *Martineau, Ltd.* v. *Royal Mail Steam Packet Co.*, 12 Asp. M. C., 190; 17 Com. Cas., 176 (referred to on p. 39 of petitioners' brief). In the former case the bills of lading contained the clause "shipped in good order and condition" and in the latter case the acknowledgment of receipt stated that the merchandise was in apparent good order and condition.

The English courts in reaching their decisions have no doubt been influenced by the fact that an English statute (18 and 19 Vict. c. 111, §3), provides that bills of lading in the hands of consignees or endorsees for valuable consideration, which acknowledge the receipt of goods on a vessel, shall be conclusive evidence of the shipment as against the master or other person signing the bill of lading. This statute was referred to by Mr. Justice White in *Missouri Pac. Ry. Co.* v. *McFadden, et al.,* 14 Sup. Ct. Rep., 990, at page 992.

The case of *National Bank* v. *Kershaw Oil Mill,* 202 Fed., 90, cited at page 40 of petitioners' brief, is not in point, as it was an action at common law for deceit, not against the carrier, but against the oil mill, which procured a bill of lading from the carrier designating certain merchandise as cotton, whereas it was technically known as "linters." Furthermore, the decision appears to be opposed in principle to that of *St. Louis I. M. & S. Ry. Co.* v. *Knight, et al.,* cited *supra,* page 35 of our brief. The petitioners also cite at page 40 the case of *Nelson* v. *Woodruff,* 1 Black (66 U. S.), 156. There the bills of lading recited that the merchandise, namely lard, was in good order and condition when shipped and the case simply involved the question as to whether or not there was any inherent vice in the lard.

On pages 41-43, the petitioners invoke the rule that "where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequence." How this rule applies to the Isla de Panay is beyond our perception. Her master did not appoint the agent at Seville.

The cases of *The David & Caroline,* 5 Blatchford, 266 and *Hannibal Railroad* v. *Swift,* 12 Wall., 262 (79 U. S., 262), cited at page 44 of the petitioners' brief, are not applicable. Both were decided years previous to the passage of the Harter Act, and the Swift case, furthermore, refers to the transportation of the property of a passenger by a rail carrier. Moreover, Captain Pastrana of the Mogador, although under no obligation to do so since the passage of the Harter Act, we submit, did in fact require the recoopering and reconditioning of the petitioners' casks before he would allow them to be shipped on the Mogador (pp. 158, 159, fols. 289-293).

The cases cited by the petitioners on pages 46 and 47 are all State court cases, except that of *The David & Caroline,* which we have already discussed, and are obviously opposed to the decisions of the Federal courts in *The Konigin Luise, The Korunna* and *The Orion, supra.*

On page 47 is an assertion that "the facts in the present case show also that a clean bill of lading imports shipment 'in apparent good order and condition' (opinion Circuit Court of Appeals, etc.)." We find no justification for this statement, in the lower Court's opinion.

The case of *Hansen* v. *American Trading Co.,* 208 Fed., 884, cited at page 52, has no application whatever. There was a dispute there between the charterer and the master of the bark Loch Rannoch as to the form of bill of lading to be signed by the captain. This controversy delayed the schooner. The Court found that both parties were at fault. The master was held not entitled to demurrage and disbursements, and the charterer's

libel against the bark for undertaking to sail without furnishing a proper bill of lading was dismissed.

On pages 54-56 the petitioners ask this Court to disregard the fundamental admiralty principle that where cargo damage comes within the exemptions of a carrier's bill of lading, the burden of proof then shifts to the cargo owner to prove negligence in the stowage or handling of his merchandise. It is unnecessary for us to do more than merely state the petitioners' proposition. It calls for no reply whatever.

At this point we might incidentally allude to the provision of the Harter Act allowing exemption to a carrier where the loss is the result of an act or omission of the shipper of the goods. The furnishing of old and insufficient containers would surely be included within that exemption.

On pages 58 and 59 the remark is again made that the lower Court suggested that the petitioners had a cause of action in fraud against the Compania Trasatlantica. We emphatically dissent from this assertion.

On page 59 the case of *Dupont* v. *Vance*, 19 Howard, 162, is cited for the proposition that the form of action is immaterial in admiralty provided only that the facts show a cause of action in favor of the libellant. It would be going a great way, we submit, to hold that a libellant, who had founded his action on contract, as here, could recover in tort. On the contrary, the admiralty practice is that an amendment of the libel, whereby the cause of action is changed, will not be permitted on the trial, after a large amount of testimony has been taken on the original issues.

See:

The Burma, 187 Fed., 94 (C. C. A., Second Circuit);
The Ask, 156 Fed., 678 (S. D., N. Y.).

On page 59 it is said that the letters of guaranty were offered in evidence by the ship. This is not true. They were simply marked for identification (p. 148, fol. 266).

The petitioners on page 63 cite the case of *Bulkley* v. *Naumkeag Steam Cotton Company*, 24 Howard, 386, and lay great stress on it. The case, however, is totally different from the instant ones. There the master of the barque engaged and paid the lighter man. The lighter had transported 100 bales of cotton down to the barque, but before they were laden aboard the barque the lighter's boiler exploded and most of the bales were lost. The master of the barque had signed bills of lading for all of the 100 bales. It was held that the barque was liable in rem. We have already pointed out in detail the facts showing that neither the Isla de Panay nor her master or officers had anything whatever to do with the issuance of the bills of lading or the employment of the S.S. Mogador. When the Isla de Panay arrived at Cadiz the merchandise was transshipped directly aboard her from the Mogador, without any previous intervention on the part of her master. The cases cited by the petitioners on page 66 as following the case of *Bulkley* v. *Naumkeag Steam Cotton Company, supra,* in no way resemble the cases at bar.

If there is a case which bears any resemblance to the instant ones it is that of *Guffey* v. *Alaska & P. S. S. Co.*, 130 Fed., 271 (C. C. A., 9th Circ.). There the Alaska & Pacific

Steamship Company, which was operating the steamer Robert Dollar, received upon its dock at Seattle certain freight to be shipped to Nome, Alaska, and issued therefor its bill of lading. The bill of lading did not mention the vessel on which the goods were to be shipped, but it recited that they were shipped on board the company's steamer then lying at the port of Seattle and bound for Nome City. It was understood between the parties, however, that the Robert Dollar was the steamer which was to carry the goods. When the goods were received the steamer was about due in Seattle from Nome. She was delayed and did not arrive at Seattle until it was too late to make another trip to Nome during that season. The cargo was never loaded on the vessel. The cargo owner libelled the ship in rem for damages for breach of contract. The trial court held that there was no lien because the goods had never been placed on board the ship or in the custody of her master, and dismissed the libel. The Circuit Court of Appeals affirmed the decision and said at page 273:

> "We think that the court committed no error in holding that under the general maritime law the contract of affreightment created no lien upon the vessel. In 1, Parsons on Shipping & Admiralty, 183, it is said:
>
> > 'The receipt of the goods by the master on board of the ship, or at a wharf or quay *near the ship*, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, or seeming to have this authority by the action or assent of the owners or master, binds the ship to the safe carriage and delivery of the goods.' (Italics ours.)

The delivery in the present case responds to all the requirements of this proposition of the textwriter, except that the goods were not delivered in the presence of or near the ship. The ship at that time, the appellant well knew, was either at Nome or on the high seas. The recital in the bill of lading that the goods were shipped on board the Alaska & Pacific Steamship Company's vessel or vessels employed or operated by them, 'and now lying at the port of Seattle,' does not have the effect to contradict the known facts. * * * Coupled with the known facts, the bill of lading was, in effect, a receipt by the steamship company of the goods on their wharf, for which freight had been paid, and an obligation to ship them on the Robert Dollar on her next trip. *The lien imposed upon a vessel on her contract of affreightment and delivery of the goods to the vessel is stricti juris, and cannot be extended by analogy or by inference.* * * * There is no case holding that the owner or agent of a vessel can, by a mere contract of affreightment made at her port while the vessel was on the high seas, thereby subject her to a lien." (Italics ours.)

The Court referred to the case of *The Keokuk* v. *Robson*, 9 Wall., 517, where this Court said that a ship owner is not liable if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board, or delivered into the custody of the carrier or his agent, and said with reference thereto at page 275:

"In this dictum of the court it is implied

that a good delivery may be made not only to the master, but to the carrier or his agent; but, in view of other utterances of the court, we have no reason to think the language so used was intended to be understood as saying that a mere delivery to the carrier or his agent, evidenced by a bill of lading, would, in the absence of the vessel, and in the absence of knowledge on the part of her master or officers of such delivery, be a constructive delivery to the ship, such as to bind her to the safe carriage of the goods."

On page 66 reference is made to the case of *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, (*The Saigon Maru*), 260 U. S., 490. That decision strongly supports the principle for which we are contending. It was held that the ship was not subject to a lien for damages for the breach of a contract of affreightment merely because of the acceptance of part of the designated cargo.

Mr. Justice McReynolds, delivering the opinion of this Court, said at page 499:

"The maritime privilege or lien, though adhering to the vessel, is a secret one which may operate to the prejudice of general creditors and purchasers without notice and is therefore *stricti juris* and cannot be extended by construction, analogy or inference. *The Yankee Blade, supra.* The contract of affreightment itself creates no lien, and this Court has consistently declared that the obligation between ship and cargo is mutual and reciprocal and does not attach until the cargo is on board or in the master's custody. We think the lien

created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the ship owner upon the cargo. See *The Thomas P. Sheldon,* 113 Fed., 779, 782, 783."

The petitioners, by the way, have continually referred to the SS. Mogador as a "lighter." She was not a lighter at all but a river steamer. She could not even be correctly designated as a steam lighter.

On page 67 it is pointed out that the lower Court, in reaching its conclusion that the Isla de Panay was not liable in rem, did so of its own volition, without suggestion by counsel for either side. The significance of this circumstance is not apparent to us. Surely the Court was within its rights in deciding the cases on a point not raised in the briefs of counsel.

On pages 70 and 71 the petitioners cite the case of *The City of Alexandria,* 28 Fed., 202, in support of the proposition that a ship may be liable in rem for the act of an agent. That case, however, was distinguished by the Circuit Court of Appeals for the Ninth Circuit from a case like that of *Guffey* v. *Alaska & P. S. S. Co., supra.*

With respect to the cases cited on pages 71 and 72, referring to the rule that a ship owner is estopped from denying the agency of the person signing its bills of lading where it has relied on exceptions therein, we may reply that the Compania Trasatlantica makes no denial that Jose Benjumea was its agent at Seville.

On page 76 further allusion is made to the *Bulkley* case and it is said that the only difference between that case and these is that here the bills of lading were signed by an agent of the company in

stead of by the master of the ship. That is not the only difference by any means between the cases, but if it were, it would constitute a sufficient reason, we respectfully submit, for this Court's declining to follow that decision.

On page 78 it is said that the present decision is irreconcilable with that of the same Court in the case of *The Minnetonka*, 146 Fed., 509, where the libellant had underestimated the amount of her damages and the Court assessed the excess amount over the stipulation for value against the claimant of the ship. Here again we beg to differ with the petitioners. There was no question there as to a change in the cause of action. The libellant had simply not placed the amount of her damages high enough. Furthermore the libellant moved to amend her libel to change the amount demanded to the sum proved. This motion was granted and the District Court entered a decree for the difference against the ship owner. Here, as we have already shown, the petitioners proceeded to trial on libels drawn in contract, and after the trial and on the argument endeavored to hold the ship on the theory of fraud without even asking for an amendment of their libels. They could not, of course, have amended them in the Circuit Court of Appeals. It would be absolutely contrary to the rules of admiralty practice to order a decree in personam against a ship owner appearing merely as claimant of the vessel, on a different cause of action from that alleged in the libels. (The cause of action which the petitioners are now relying on, as we have previously shown, is outside of the admiralty jurisdiction, in any event.)

The Southwark, 129 Fed., 171, cited on page 80, is of no value so far as the issues herein are concerned, and will therefore be disregarded.

POINT V.

The decrees of the lower Court should be affirmed.

Dated, New York, January 15, 1925.

Respectfully submitted,

JOHN W. CRANDALL,
Counsel for Claimant-Respondent.

HUNT, HILL & BETTS,
Proctors for Claimant-Respondent.

AUSTIN NICHOLS & COMPANY *v.* STEAMSHIP "ISLA DE PANAY," HER ENGINES, ETC., ET AL.

SANCHEZ ET AL., COPARTNERS, TRADING AS E. SANCHEZ & COMPANY, *v.* STEAMSHIP "ISLA DE PANAY," HER ENGINES, ETC., ET AL.

E. TOLIBIA & COMPANY *v.* STEAMSHIP "ISLA DE PANAY," HER ENGINES, ETC., ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 199, 200, 201. Argued January 19, 1925.—Decided March 2, 1925.

In proceedings *in rem* brought by consignees against a vessel to recover for damage to shipments of olives consigned in casks from Seville to New York, it appeared: that the damage was due to the weakness of the casks in which they were shipped and not to the ship's negligence; that this weakness was known to the ship's agent, before he accepted the shipment from the consignors at Seville and issued bills of lading, and to her captain when the casks were transferred from another vessel to the libeled ship at Cadiz; that the agent had accepted the shipment and issued the bills of lading "clean," without noting thereon the state of the casks, upon condition that the consignors give the shipowner a letter of guarantee relieving it from responsibility therefor, which was done; that the bills of lading expressly exempted the ship from responsibility for damage resulting from fragile containers; that the consignees had directed their Seville bankers to pay the agreed purchase price for the olives upon presentation of clean bills of lading, and that the consignors thus obtained payment upon the bills in question, though there was nothing to show that the ship or its owner knew of this arrangement between buyer and seller or that the bank, in accepting the bills, lacked information of the circumstances attending their issue. The petition did not allege fraud or any peculiar trade usage at Seville—*Held:*

(*a*) That the evidence was insufficient to establish fraud. P. 272.

(*b*) That the evidence, including testimony by the ship's captain, was insufficient to establish a trade usage that bills of lading without notations impliedly acknowledged receipt of merchandise in apparent good order and condition. P. 272.

(*c*) According to the long established rule, bills of lading, like those in question, do not affirmatively represent good order and condition; and the Harter Act, (c. 105, 27 Stat. 445,) does not require that they be given a different effect, either by construction or by estoppel. P. 273.

292 Fed. 723, affirmed.

CERTIORARI to decrees of the Circuit Court of Appeals affirming decrees of the District Court, which dismissed three libels *in rem* for damages to goods.

Mr. T. Catesby Jones, with whom *Mr. James W. Ryan* was on the briefs, for petitioners.

The decision of the lower courts that although the petitioners were defrauded there can be no estoppel unless there is an express representation by a recital in the bill of lading, is directly contrary to the decisions of this Court and of the Circuit Courts of Appeals of other circuits that an estoppel need consist only of a concealment of a material fact by a person under a duty to disclose it resulting in prejudice to the person from whom the information has been withheld. *Morgan* v. *Railroad Company*, 96 U. S. 716; *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96; *Dickerson* v. *Colgrove*, 100 U. S. 578; *United States Bank* v. *Lee*, 13 Pet. 107; *Stewart* v. *Wyoming Ranch Co.*, 128 U. S. 383; *Turner* v. *Green* (1895) 2 Ch. 205.

In the present case there was not merely negligence or silence of the *Isla de Panay's* agent, but deliberate and intentional concealment. Her agent did not merely stand by when the bills of lading were issued, but conspired with the shippers to defraud purchasers of the goods shipped. He declined to issue clean bills of lading until the shippers would indemnify him against what he knew would be a result of his fraudulent act.

The decisions of the courts below are contrary to the decisions of Circuit Courts of Appeals of other circuits. *H. Scherer & Co.* v. *Everest*, 168 Fed. 822; *The Tampico*, 270 Fed. 537.

The elements of an estoppel *in pais* are stated by Pitney J., in *Central Railroad Co.* v. *MacCartney*, 68 N. J. L. 165. See *Higgins* v. *Anglo-Algerian S. S. Co.*, 248 Fed. 386; *Martineaus* v. *Royal Mail Steam Packet Co.*, 12 Asp. M. C. 190; *Bradstreet* v. *Heran*, 3 Fed. Cas. 1183; *Crawford & Law* v. *Allan Line S. S. Co.*, (1912), A. C. 130; *National Bank* v. *Kershaw Oil Mill*, 202 Fed. 90; *Nelson* v. *Woodruff*, 1 Black 156.

If the *Isla de Panay's* agent were entirely innocent of misrepresentation or fraud, the *Isla de Panay* should, nevertheless, be held liable under the rule that, where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong. *Peoples Bank* v. *National Bank*, 101 U. S. 181; *Butler* v. *United States*, 21 Wall. 272; *Pompton* v. *Cooper Union*, 101 U. S. 196; *Hern* v. *Nichols*, 1 Salkeld 289; *Briggs* v. *Jones*, 10 Eq. 92; *Smith* v. *Armour Packing Co.*, 158 Fed. 86; *H. Scherer & Co.* v. *Everest*, 168 Fed. 822.

The carrier was under a duty to disclose to the consignee the fact that the casks were apparently in bad external condition and unfit for carriage. *Rodocanachi* v. *Milburn* (1886), 18 Q. B. D. 67; *Hinrichs* v. *Bank*, 279 Fed. 382.

The *Isla de Panay*, being a general cargo ship, had the same right as any other common carrier to refuse to accept goods packed in defective containers. *Hannibal R. R. Co.* v. *Swift*, 12 Wall. 262; *The David & Caroline*, 5 Blatch. 266.

An implication arises that the goods covered by the bill of lading are normally fit to withstand ordinary handling during the carriage and discharge, unless the shipmaster makes notations to the contrary. This implication also arises as a corollary of the principle recognized as to all

kinds of contracts, that it is the duty of a contracting party who has exclusive knowledge of material facts to disclose those facts to the other party. *Strong* v. *Repide*, 213 U. S. 419; *Molyneux* v. *Hawtrey*, L. R. (1903) 2 K. B. 487; *Carlish* v. *Salt*, L. R. (1906) 1 Ch. 335; *Phillips* v. *Homfray*, L. R. 6 Ch. 770; Williston on Sales (2nd Ed.) §§ 234 and 265; *Cesar* v. *Karutz*, 60 N. Y. 229; *Harp* v. *Choctaw O. & G. R. Co.*, 125 Fed. 445.

The liability of a common carrier of goods does not primarily, at least, rest on the contract to carry, but is implied by law, having its foundation in the policy of the law, and it is by reason of this legal obligation that a carrier is charged with the loss of, or injury to, property intrusted to it for carriage. *Railroad Co.* v. *Swift*, 12 Wall. 262; *The Georg Dumois*, 88 Fed. 537; *Klauber* v. *American Express Co.*, 21 Wis. 21; *Atlantic Coast Line R. Co.* v. *Rice*, 169 Ala. 265; *The Delaware*, 14 Wall. 579.

A duty to disclose also arose from the trade usage which was testified to by the respondent's witnesses. This usage required that if casks were offered for shipment in apparent bad external condition, the bills of lading should contain notations showing that fact.

A duty to disclose also arose from the issuance by the *Isla de Panay* of commercial documents intended for sale to innocent buyers. Admiralty courts have always held the issuers of bills of lading to a high standard of fairness. This tends to encourage commerce. If there is no duty of the issuer of a bill of lading intended for sale to an innocent consignee to disclose, at least in a general way, facts obviously impairing the value of the bill of lading, ships' agents will be encouraged to issue confused and ambiguous bills of lading and to tamper with the centuries-old recitals which have made bills of lading a trustworthy and marketable symbol of the goods described and thus permitted the expansion and development of international commerce. *Pollard* v. *Reardon*, 65 Fed. 848; *Watts* v. *Cargo of Lumber*, 161 Fed. 104.

A duty to disclose also arose from § 4 of the Harter Act of February 13th, 1893. *Knott* v. *Botany Mills*, 179 U. S. 69; *The Delaware*, 161 U. S. 459; *Hansen* v. *American Trading Co.*, 208 Fed. 884.

The court below incorrectly decided as matter of law that "the burden of proof rested upon the libelants to establish negligence on the part of the claimant, and this burden we have no hesitation in saying was not sustained." *Higgins* v. *Anglo-Algerian S. S. Co.*, 248 Fed. 386; s. c. 242 Fed. 568; *Bank of Batavia* v. *New York etc., R. Co.*, 106 N. Y. 200.

Mr. John W. Crandall for respondent.

The Circuit Court of Appeals correctly held that the petitioners were not entitled to a recovery against the steamship *Isla de Panay*, because the damage to the merchandise came within the exemptions of the bills of lading issued for the goods and the petitioners totally failed to prove negligence on the part of the ship or the claimant-respondent.

The cargo owners assume the burden of proving negligence when the damage falls within a valid bill of lading exemption. *Clark* v. *Barnwell*, 12 How. 272; *The Henry B. Hyde*, 90 Fed. 114; *The Patria*, 132 Fed. 971; *The Lennox*, 90 Fed. 308; *The J. L. Luckenbach*, 209 Fed. 142; *The Arpillao*, 270 Fed. 426.

The petitioners' casks were of insufficient strength for the carriage of olives. The *Isla de Panay* is therefore exempt from liability both under the Harter Act and the exceptions of the bills of lading.

The case of *Higgins* v. *Anglo-Algerian S. S. Co.*, 248 Fed. 386, which has been practically the sole reliance of the petitioners, is unsound. *Williams* v. *Providence Washington Ins. Co.*, 56 Fed. 159; *The Plymouth*, 3 Wall. 20; *Pollard* v. *Vinton*, 105 U. S. 7; *Atchison, Etc., Ry. Co.* v. *Harold*, 241 U. S. 371; *St. Louis, Etc., Ry. Co.* v. *Knight*, 122 U. S. 79.

Neither the *Isla de Panay* nor her owner is estopped from showing the insufficiency of the petitioners' casks. *The Eli Whitney* (1848), Fed. Cas. 4345.

A carrier issuing a bill of lading which is silent as to the condition of the goods, is not thereby penalized by being deprived of the defenses ordinarily available under the Harter Act. *The Isola di Procida*, 124 Fed. 942.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

These are proceedings *in rem* against the Isla de Panay to recover for damage to merchandise brought by her from Cadiz, Spain. They present the same issues and were heard on the same proof. It will suffice to refer to the facts disclosed in number 199.

December 21, 1917, in the United States District Court, Southern District of New York, Austin Nichols & Company, a corporation, filed a libel and complaint against the respondent steamship.

It alleged: Ownership of the damaged merchandise. Presence of the vessel within the court's jurisdiction. That "On October 27, 1917, Rowlett y Pyman shipped and placed on board the steamship Isla de Panay, then lying at the port of Cadiz, Spain, two hundred and twenty-seven (227) packages of olives in good order and condition, to be carried by the said steamship Isla de Panay as a common carrier from the port of Cadiz to the port of New York and there to be delivered in like good order and condition as when shipped to your libellant, in accordance with the terms of bills of lading then and there issued for the said shipment and in consideration of an agreed freight. Thereafter the said steamship Isla de Panay sailed from the port of Cadiz and arrived at the port of New York in the month of November, 1917, and there discharged her cargo, not in like good order and condition as when shipped, but badly damaged."

Consequent damages amounting to about eleven thousand dollars.

It prayed: For process according to the course and practice in causes of admiralty and maritime jurisdiction to issue against the steamship, her engines, boilers, etc. That a decree be granted for the damage sustained and the steamer condemned and sold to satisfy the same.

The Compañia Trasatlantica claimed the vessel as sole owner, obtained her release and answered, denying liability. It admitted receipt of the goods and alleged their carriage and delivery as required by the bills of lading. It specifically admitted and alleged: "That on or about the 6th day of November, 1917, there were shipped on board the steamship Isla de Panay, then at the port of Cadiz, Spain, and bound for the port of New York, 227 casks said to contain olives, the weight and contents of said casks and their quality, however, being stated to be unknown to the claimant, which expressly declined to be responsible therefor. . . . That it was agreed that the merchandise should be transported for a stipulated freight to the port of New York and there be delivered to the order of the libellant, subject to the conditions and exceptions from liability contained in the bills of lading issued for said merchandise at Seville, Spain, from which port said merchandise was shipped in the first instance. . . . That thereafter the steamship Isla de Panay sailed from the port of Cadiz, Spain, and arrived in due course at the port of New York in the month of November, 1917, and that it thereafter delivered at the port of New York all of the above mentioned merchandise which it received on board the ship at Cadiz in pursuance of and in compliance with the terms and conditions of the bills of lading hereinabove referred to." That the bills of lading expressly exempted the vessel from responsibility for damage resulting from breakage of the articles and fragile containers; the ship was in all respects seaworthy,

properly manned, equipped and supplied for the voyage; if the merchandise suffered loss or damage the ship was relieved from liability by the bills of lading, particularly that clause concerning breakage and fragile containers, also by the Harter Act, approved February 13, 1893, c. 105, 27 Stat. 445, 446.

Upon the indicated issues evidence was taken and the cause went to hearing.

The agent of the owner of the Isla de Panay stationed at Seville, Spain, there accepted the casks of olives (each of them weighed 1500 pounds or more) and delivered to the consignors bills of lading. These recited: "M. Rowlett and Pyman has shipped on board the Spanish steamer Isla de Panay, its captain M—, with destination to New York and consigned to Austin Nichols, the effects declared on back on the following conditions. . . . ignoring weight and contents." They said nothing concerning order or condition of the merchandise and contained exemption clauses as stated in the answer.

The casks were carried down the River Guadalquivir seventy-five miles to Cadiz, on a small steamer belonging to the owner of the Isla de Panay, and were there delivered to her. They were loaded, stored, transported and landed at New York without negligence or default by the vessel; but the casks broke and the olives were damaged. That the casks were old, weak and quite liable to break was observed by the owner's agent at Seville, and because of this he declined to accept them until the shippers gave the following agreement to secure against loss—

"Sevilla, November 5, 1917.

Compañia Trasatlantica, Sevilla.

My dear Sirs: With reference to the shipment of 227 casks of olives that we are making by the steamer Isla de Panay to New York, we understand that that company considers the containers insufficient and that it does not

accept responsibility for the damages that they suffer as natural consequences of the voyage. And as guarantee of that company we sign the present, as you have delivered us clean bills of lading. Yours very truly, Rowlett & Pyman."

The captain of the Isla de Panay did not see the bills, nor did he know of the letter of guaranty until after the voyage had been completed. He observed the bad condition of the casks before accepting them at Cadiz, and their imperfection was noted on the accompanying shipping orders.

It appears that Austin Nichols & Company had directed their bankers at Seville to pay the agreed purchase price for the olives upon presentation of clean bills of lading. The bankers accepted the bills presently under consideration and paid the stipulated price to the consignors. There is nothing to show that the ship or her owner knew of the particular arrangement between buyer and seller.

Libellants now insist that a trade usage prevailed at Seville under which bills without notation were regarded as receipts for merchandise in apparent good order and condition, and to establish this usage they rely upon an answer in the testimony of the vessel's captain. When asked by respondents' counsel, "Why are these letters of guarantee given in Seville?" he replied—

"If the bills of lading are issued with a note on them the insurance companies or the bankers in Spain will not accept that bill of lading on account of the condition in which the goods are, but if they have no clause on it they will pass it to a banking house and the insurance company that they have been shipped by the shipper in apparent good order and condition, although they have issued a letter of guarantee relieving the company of any responsibility whatsoever for the condition of the packages."

Eduardo Benjumea, the owner's agent at Seville who issued the bills, testified—

"In view of the above and as was usually done in such cases, according to custom and at the request of the shippers in order that their goods might not be prejudiced more than was necessary, and at the same time to relieve the company which I represent from responsibility, I ordered the acceptance of the letters of guarantee . . . The custom of demanding letters of guarantee by steamship companies from shippers to protect themselves from possible claims for the arrival in bad condition of the shippers' goods at the port of destination, is old and well established and based on the following: (1) The decided opposition on the part of the shippers to notations being placed on the bills of lading which unnecessarily prejudices their goods and leaves everything to the good faith of the receivers. (2) Due to the general character that would necessarily have had to be given to the notations on the bills of lading and it being practically impossible to examine carefully all the casks one by one both on account of economy and fixed dates on which the mail boats of the Compania Trasatlantica had to depart from Cadiz for the States; we could make, with such notations, greater damage than would be justifiable, which considering the honorable practices of the Compania Trasatlantica, we naturally tried to avoid. (3) Although letters of guarantee were always requested for the above stated reasons, an exceptional use of these letters was made during the European war, as a consequence of the general bad quality of the packing which, during that time, was presented for shipment. This bad quality of the packing was due to the lack of containers in good condition and an enormous demand for containers of this class which it was impossible to meet. What took place was the use of all available containers notwithstanding their sometimes inferior quality; that is, chestnut wood was accepted in place of oak in spite of the fact that old oak containers are stronger than new ones of chestnut. I

have been sixteen years in the shipping business as shipping agent, and have had a great experience in matters thereto pertaining, derived from the years so spent."

The District Court dismissed the libel. It said—

"The great weight of evidence is to the effect that the chestnut casks containing the olives were old and insufficient at the time the merchandise left Seville for transshipment to claimant's vessel at Cadiz . . . The libelants paid drafts accompanying the bills of lading without knowledge that the containers were old and insufficient. If there is any liability here for damages it is upon the theory that by failing to note in the bills of lading any insufficiency in the containers, the steamship misled the libelants to their injury and is now estopped under the doctrine of *Higgins* v. *Anglo-Algerian Steamship Co.*, 248 Fed. 386, to claim that the containers were insufficient. In that case, however, there was in the bill of lading an express representation that the merchandise itself was in apparent good order and condition, when it was known to be injured by rain water. Here the parties believed doubtless that the olives would go through, but the ship's agents were not willing to take the risk of any liability which might arise from old casks. No case has gone so far as to hold that a bill of lading containing no words representing the condition of the containers would give rise to an estoppel. The Harter Act expressly provides that the vessel shall not be liable for any 'insufficiency of package.'"

The Circuit Court of Appeals affirmed the decree of dismissal. Having pointed out that the proceedings were *in rem* against the vessel and not *in personam* against the owner; that the libel alleged the merchandise was placed on board "in good order and condition," and was not discharged "in like good order and condition"; that the bills were not signed by the captain; that the containers were weak when received, etc.; that court expressed inability

to discover any ground upon which the libel could be sustained. It found—

"In the instant cases the damage to the merchandise came within the exceptions of the bill of lading which declared that the shipowners were not responsible for breakage. That many of the casks were broken is undisputed. The burden of proof rested upon the libelants to establish negligence on the part of the claimant and this burden we have no hesitation in saying was not sustained. On the contrary it has been established by the overwhelming weight of evidence that whatever damage the merchandise suffered in the cases now before the court was due not to the negligence of the ship but to the old and insufficient containers in which the goods were shipped."

And it held that the ship was not estopped to set up the bad condition of the casks by anything done at Seville or under the Harter Act; and that *Higgins* v. *Anglo-Algerian S. S. Co.*, 248 Fed. 386, was not controlling.

Counsel for petitioners maintain: That with corrupt purpose and as part of a scheme to defraud petitioners, the ship issued bills of lading designed to conceal the bad condition of the casks, knowing that the shippers intended to obtain money upon them according to the local usage. That under the Seville usage bills of lading without notations impliedly acknowledged receipt of the merchandise in apparent good order and condition, and the ship could not repudiate this representation. That, considering this local trade usage, it was the positive duty of the ship to disclose the bad condition of the casks. Failure therein made the fraud upon petitioners possible, and "Where one of two innocent parties must suffer he must bear the loss whose act put it into the power of the third party to commit the wrong." That Section 4 of the Harter Act imposed the positive duty to disclose the containers' bad condition. And, finally, that the doctrine approved in *Higgins* v. *Anglo-Algerian S. S. Co.*, is applicable and controlling.

Evidently the libels were drafted with the expectation of showing that the merchandise suffered damage from bad handling. Petitioners' witnesses testified that the casks reached New York in good condition but were negligently unloaded. The manager for Austin Nichols & Company said: "The casks were satisfactory containers." "I do not claim that the casks were bad." "Our claim is that these casks were handled in a bad way, by bad methods." "I do not make any claim about the casks, but we are making a claim about the manner in which they were handled."

The courts below, correctly we think, have found that the overwhelming weight of evidence shows the casks were in bad condition when received at Cadiz but were loaded, carried and discharged without negligence or fault.

Petitioners did not allege fraud or any peculiar trade usage at Seville, and there is no sufficient evidence to establish either of these things. The mere statement by the ship's captain referred to above is not enough to show a peculiar trade usage at Seville, there commonly known and acted upon; and it does not apear that the bank which accepted the bills of lading lacked full information concerning the circumstances attending their issue. The argument of counsel proceeds mostly upon assumption not supported by the record. *Bowling* v. *Harrison*, 6 How. 248, 259; *Adams* v. *Otterback*, 15 How. 539, 545, 546; *Oelricks* v. *Ford*, 23 How. 49, 61, 62. And see Carver on Carriage of Goods by Sea, 6th Ed., Sec. 181 *et seq.*

The Harter Act provides—

"Sec. 4. It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether

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it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

"Sec. 5. For a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. . . ."

In the present case the bills of lading were issued as agreed by the parties—no demand was made for bills with different recitals. According to the long established rule, bills like those before us do not affirmatively represent good order and condition (*Atchison, Topeka & S. F. Ry.* v. *Harold*, 241 U. S. 371), and we find nothing in the Harter Act which requires that they be given a different effect, either through construction or by estoppel.

Higgins v. *Anglo-Algerian S. S. Co., supra*, is essentially different from the present cause. There the bill of lading expressly recited that the merchandise had been received in good order and condition; and the ship was seeking to escape liability by setting up its own wrongful action.

The decrees below must be

Affirmed.

MR. JUSTICE SUTHERLAND, dissenting.

I am unable to agree with the opinion just delivered. It seems to be conceded, but in any event I think it must be conceded, that if the bills of lading had contained a recital that the merchandise was received in good condition the ship would have been estopped from asserting that in fact it was in bad condition. *Higgins* v. *Anglo-Algerian S. S. Co.*, 248 Fed. 386. Here, I think, the circumstances are such as to make the omission of a recital

upon the subject the equivalent of a statement of good condition.

The shipment was accepted and the bills of lading issued by the ship's agent [1] who testified that he was aware of the bad condition of the merchandise and that the letters of guarantee were taken with the understanding that no notation to that effect would be made on the bills. They were what are known as "clean bills," which meant, in this case at least, according to the evidence, bills which "a banker will accept and attach to a draft and on which he will make payment against a letter of credit, and which *indicates that the merchandise was in good condition when it was received from* [*by*] *the steamship company.*" Without going into detail, I think it is fairly to be deduced from the evidence that the usages of the trade required a notation, and the evidence is clear that a notation of bad condition would have been made except for the letters of guarantee. The master of the Panay testified: "If a letter of guarantee is given me relieving me or the ship of all responsibility, as was done

[1] Section 4 of the Harter Act makes it the duty of the owner, master or *agent* of the *vessel* to issue a bill of lading. The bills of lading recite that the merchandise in question has been shipped on "the Spanish steamer Isla de Panay" and purport to be issued by the "Agent of the Steamer." The agent at Seville who issued the bills, in one place calls himself an agent of the company and in another place speaks of "this agency for the S. S. Isla de Panay." The fact is that the question of agency was not seriously in issue in the trial court, and the statements in the evidence relating thereto were more or less casual, but enough appears to make it clear to my mind that the relation of agent to the ship was fairly established. A point is made of the fact that the bills of lading were delivered at Seville while the merchandise was delivered to the Panay at Cadiz. But delivery of the merchandise at Seville to the small steamer belonging to the same owner, for the sole purpose of transshipment, was in effect a delivery to the Panay. *Bulkley* v. *Naumkeag Steam Cotton Co.*, 24 How. 386; *The City of Alexandria*, 28 Fed. 202, 205-206.

in this case, no notation will be put on the bill of lading, but if there is no letter of guarantee given, then a notation will be put on the bill of lading."

Consignees had instructed their bankers in Spain to pay the purchase price of the goods only upon presentation of clean bills of lading, and there is evidence to the effect that if bills are issued with a notation of bad condition they will not be accepted by insurance companies or bankers in Spain, but if such note be omitted they will pass, upon the assumption that the goods have been shipped in apparent good order and condition. Upon this assumption, the bills were passed and payment made. Under these circumstances, the omission of the notation in respect of the condition of the goods was nothing short of a suppression of the truth in order to further the fraudulent designs of the shippers. Upon every principle of fair dealing it should be regarded as the equivalent of a false notation of good condition which the ship is estopped to deny as against the claims of the consignees who relied upon it. To hold otherwise is to permit the wrongdoer to take advantage of his own misconduct, which a court of admiralty cannot allow with due regard for those equitable principles by which it is governed.

I am authorized to say that the CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER concur in this dissent.